# Abusive Constitutionalism

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*This paper identifies an increasingly important phenomenon: the use of mechanisms of constitutional change to erode the democratic order. A rash of recent incidents in a diverse group of countries such as Hungary, Egypt, and Venezuela has shown that the tools of constitutional amendment and replacement can be used by would-be autocrats to undermine democracy with relative ease. Since military coups and other blatant ruptures in the constitutional order have fallen out of favor, actors instead rework the constitutional order with subtle changes in order to make themselves difficult to dislodge and to disable or pack courts and other accountability institutions. The resulting regimes continue to have elections and are not fully authoritarian, but they are significantly less democratic than they were previously. Even worse, the problem of abusive constitutionalism remains largely unresolved, since democratic defense mechanisms in both comparative constitutional law and international law are largely ineffective against it. Some of the mechanisms most relied upon in the literature — such as the German conception of militant democracy and the unconstitutional-constitutional amendments doctrine — are in fact either difficult to deploy against the threat of abusive constitutionalism or easily avoidable by would-be authoritarian actors. This Article suggests ways to reinforce democracy against these threats, while acknowledging the extreme difficulty of the task. The phenomenon of abusive constitutionalism should impact the conversation about how the fields of*

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*comparative constitutional law and international law might best be leveraged to protect new democracies.*

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## INTRODUCTION

One of the central questions in constitutional theory is how constitutions can be used to better protect against threats to the democratic order. This question has taken on new urgency since the Arab Spring, with a fresh wave of new, embattled democracies throughout the Middle East. This Article defines and grapples with an increasingly important phenomenon that I call abusive constitutionalism. Abusive constitutionalism involves the use of the mechanisms of constitutional change — constitutional amendment and constitutional replacement — to undermine democracy. While traditional methods of democratic overthrow such as the military coup have been on the decline for decades, the use of constitutional tools to create authoritarian and semi-authoritarian regimes is increasingly prevalent. Powerful incumbent presidents and parties can engineer constitutional change so as to make themselves very difficult to dislodge and so as to defuse institutions such as courts that are intended to check their exercises as power. The resulting constitutions still look democratic from a distance and contain many elements that are no different from those found in liberal democratic constitutions. But from close up they have been substantially reworked to undermine the democratic order.

I draw off of recent examples from Hungary, Colombia, and Venezuela to illustrate the threat. But it is important to note that these examples only scratch the surface of what is an increasingly routine occurrence. For example, the Muslim Brotherhood in Egypt recently used its dominating electoral power in the parliament, constituent assembly, and presidency, rather than extra-legal means, to craft a constitution that appears to be very favorable to its own interests.[1] Although the civilian government was since removed in a coup, commentators have argued that the constitution-making experience was designed to construct Egypt as a competitive authoritarian regime, where elections are held but the incumbent party is difficult to dislodge and relatively unchecked in its power.[2]

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[1] *See* David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 971-80 (2013) [hereinafter *Constitution-Making*] (summarizing and analyzing the Egyptian constitution-making process).

[2] *See, e.g.*, Abdullah Al-Arian, *The Logic Behind Egypt's New Authoritarianism*, AL JAZEERA, http://www.aljazeera.com/indepth/opinion/2012/12/2012124111437225259.html (last modified Dec. 5, 2012, 9:48 AM) (examining the constitution-making process in Egypt and arguing that it may lead to a "new authoritarianism" there); Zachary Laub, *Egypt's Muslim Brotherhood*, COUNCIL ON FOREIGN REL., http://www.cfr.org/africa/egypts-muslim-brotherhood/p23991?cid=rss-middleeast-egypt_s_muslim_brotherhood-120312

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Similarly, the phenomenon is showing up even in some countries generally considered stable liberal democracies. For example, the Japanese Prime Minister Shinzo Abe, the leader of the traditionally dominant Liberal Democratic Party (LDP), recently announced that he would pursue constitutional changes that would reduce the required majorities for constitutional change from two thirds of the Diet to only a simple majority.[3] Since the LDP won massive legislative majorities in the last election, it will likely be able to push through this proposal. There is little risk that such a change will render Japan thoroughly undemocratic, but it does serve to erode democracy by allowing the powerful LDP to unilaterally push through any changes it might want. Such changes could obviously be used to increase the power of the LDP and to reduce the already-weak checks (such as the judiciary) on its power.[4]

Constitutions have proven to be remarkably susceptible to these sorts of maneuvers. In countries outside of the United States, amendment thresholds are often set fairly low, allowing incumbents to round up sufficient support for sweeping changes with relative ease. Even where amendment thresholds are set higher, incumbent regimes can reach requisite legislative supermajorities with surprising frequency. And where constitutions cannot be amended in ways that would-be autocrats would like, these figures can often replace constitutional texts quite easily, as recently occurred in Hungary, Ecuador, and Venezuela. The set of formal rules found in constitutions is proving to be a mere parchment barrier against authoritarian and quasi-authoritarian regimes.

There is even worse news: existing democracy-protecting mechanisms in international and comparative constitutional law have

(last updated July 10, 2013) (noting the Muslim Brotherhood's reliance on "majoritarianism" and the broad powers accorded to the president under the new constitution).

[3] Lawrence Repeta, *Get Ready for New Battles Over Japan's Constitution*, INT'L J. CONST. L. BLOG (Feb. 7, 2013), http://www.iconnectblog.com/2013/02/get-ready-for-new-battles-over-japans-constitution.

[4] Scholars have long noted that the Japanese Supreme Court is a weak institution that does not carry out effective judicial review. The stock reason proceeds from the absence of political competition in the country — the dominant LDP party has had no reason to empower a court that would only check its power. *See, e.g.*, David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1426-28 (2011) (accepting parts of this story while arguing that it is oversimplified); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994) (comparing the United States and Japanese Supreme Courts, and arguing that the lack of independence of the latter can be attributed to an absence of political competition).

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proven ineffective against this new threat. Abusive constitutionalism is much harder to detect than traditional authoritarian threats. In international law, so-called "democracy clauses" often punish regimes that come to power through unconstitutional means. These clauses are effective at detecting traditional military coups, which are openly unconstitutional, but much less effective at detecting abusive constitutionalism, which uses means that are either constitutional or ambiguously constitutional. The recent experience in Honduras, for example, shows how these clauses fail to effectively combat abusive constitutionalism.[5] In comparative constitutional law, the most important democracy-protecting mechanism, recently touted by Samuel Issacharoff, is the "militant democracy" conception created in post-war Germany, which allows for bans on anti-democratic parties (such as the Nazi party) before they have the chance to grow and gain power within the democratic order.[6] This conception is again useful for staving off traditional authoritarian threats carried by obviously anti-democratic forces like the Nazis, but much less useful for contending with the more ambiguous, non-ideological threat posed by abusive constitutionalism. Abusive constitutionalism thus poses problems that are not being effectively combatted in either international law or domestic constitutional law.

A more promising set of responses focuses on the design of mechanisms of constitutional change, particularly constitutional amendment rules. This model, which one might call "selective rigidity," combines a low threshold for most amendments with selected blockage or higher thresholds for some kinds of change that are particularly likely to lead to abusive constitutionalism. For example, constitutional designers can use tiered constitutional provisions to make it more difficult to change sensitive structural provisions that are especially likely to be targeted by abusive constitutional efforts. Courts can also be given the power to strike down some proposed amendments that violate core principles of the constitutional order — this is the so-called "unconstitutional-constitutional amendments doctrine," which has been used to great

[5] *See generally* Noah Feldman, David Landau, Brian Sheppard & Leonidas Rosa-Suazo, *Report to the Truth and Reconciliation Commission of Honduras: Constitutional Issues* (Fla. St. U. Pub. Law & Legal Theory, Research Paper No. 536, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1915214 (examining both the abusive constitutionalism of Honduran President Manuel Zelaya and the questionable constitutionality of his removal from power).

[6] *See* Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1408-09 (2007) [hereinafter *Democracies*].

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effect by courts in India, Turkey, and Colombia. These kinds of responses represent a state-of-the-art in constitutional theory.

But scholars appear to have overstated the ability of these tools to prevent abusive constitutionalism. They may help stop some exercises, but they also contain weaknesses that limit their ability to serve as defense mechanisms for democracy. Tiered constitutional provisions, as currently designed, tend to serve an expressive function more than a practical one — the heightened amendment thresholds tend to protect provisions like human dignity, which are unlikely to be targeted by abusive constitutional regimes. And it is doubtful that constitutional designers could adequately write tiered provisions in a way that would protect all of the vulnerable elements of constitutional structure, at least without making the text unduly rigid. The unconstitutional-constitutional amendments doctrine can be deployed more flexibly, but this very flexibility can be problematic — in some cases, the doctrine appears to be interpreted far too broadly in order to cut off ordinary democratic politics, while in other cases courts are packed or threatened in ways that make the doctrine impossible to deploy. Further, the doctrine rests on a distinction between constitutional amendment (which is seen as susceptible to abuse) and constitutional replacement (which is seen as representing the authentic will of the people) that is belied by reality. Constitutional replacement, as well as amendment, can be and is used by would-be authoritarians to advance their agendas.

The rest of this Article proceeds as follows: In Part I, I define abusive constitutionalism, give recent examples of it in Colombia, Venezuela, and Hungary, and explain why constitutional tools are so effective at entrenching modern authoritarian regimes. Constitutional change allows authoritarian actors to remove members of the political opposition and to replace them with officials loyal to the incumbents; to weaken, disable, or pack courts as well as other mechanisms of accountability; and to establish government control over the media and other key institutions. Part II explains why existing tools in comparative constitutional law — the militant democracy conception made famous by German constitutionalism, tiered constitutional amendment thresholds, and the unconstitutional-constitutional amendments doctrine — appear to fail when confronted with abusive constitutionalism. Part III points out similar holes in democracy-protection mechanisms in international law, and considers the prospects of emerging solutions like the recent call for an International Constitutional Court. Finally, I conclude by asking whether constitutional theory is capable of devising better solutions to the problem I have identified. The study of abusive constitutionalism

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forms a research agenda that ought to command more attention from constitutional designers, and that may help inform key questions in constitutional theory — such as the nature of constitutionalism and the relationship between constitutionalism and democracy.

## I. DEFINING AND EXPLAINING ABUSIVE CONSTITUTIONALISM

In this Part, I define the practice of abusive constitutionalism and situate it within recent advances in both constitutional theory and regime theory, explaining why constitutionalism is now being used quite frequently to weaken democracy. In contrast to past practice, where authoritarian regimes were generally formed through military coup or other unconstitutional practices, would-be autocrats now have significant incentives to appear to be playing by the constitutional rules.[7] Thus they are increasingly turning towards constitutional amendment and replacement as tools to help them construct a more authoritarian order. Then I give three examples drawn from recent experiences in Colombia, Venezuela, and Hungary, showing how powerful individuals and political parties can use the tools of constitutionalism to undermine it.[8] The end result of these practices is not likely to be full-fledged authoritarianism, but rather a hybrid regime where elections continue to be held but opposition forces face severe disadvantages in seeking to win election. Finally, I synthesize the results of the case studies to explain why constitutionalism appears to be important to these various efforts.[9]

### *A. Defining and Situating Abusive Constitutionalism*

I define "abusive constitutionalism" as the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before. In referring to the mechanisms of constitutional change, I focus here on formal rather than informal methods of change — constitutional amendment and constitutional replacement. In referring to maneuvers that make a regime "significantly less democratic," I conceptualize democracy on a spectrum, acknowledging that there are various kinds of hybrid or competitive authoritarian regimes between full authoritarianism and full democracy.[10] Finally, in referring to the degree of democracy in a

[7] *See infra* Part I.A.

[8] *See infra* Parts I.B–D.

[9] *See infra* Part I.E.

[10] *See infra* text accompanying notes 24–29.

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given country, I focus on two distinct dimensions: (1) the electoral sphere and the extent to which incumbent and opposition figures compete on a level playing field, and (2) the extent to which the rights of individuals and minority groups are protected.[11] Conceptually, these two dimensions are independent and could diverge, but in the regimes discussed here, backsliding in the electoral realm appears to be highly correlated with backsliding on rights questions.

The biggest fear for those promoting democracy in the developing world has long been the military coup. In Latin America, alone, all but two major countries were under military dictatorship at some point in the 1960s and 1970s.[12] Although in some cases military dictators might seek legal legitimation for their actions, military coups are ordinarily done in obvious defiance of the existing constitutional order.[13] In Chile, for example, the military removed the civilian regime

[11] The rights dimension is sometimes classified as the degree to which a regime is liberal, which is sometimes placed in opposition to democracy and at other times seen as "constitutive" of it. *See, e.g.*, STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 8 (1995). Given broad practical agreement on the desirability of rights protections within a state, I do not enter into that debate here. To be sure, these two dimensions may not exhaust the normative dimensions of democracy. We might, for example, define democracy with respect to participation as well, and some analysts of at least the Venezuelan and Ecuadorian regimes below have made claims that they represent a significant advance in the quality and extent of participation within those countries. *See, e.g.*, Maxwell Cameron & Kenneth E. Sharpe, *Andean Left Turns: Constituent Power and Constitution Making*, *in* LATIN AMERICA'S LEFT TURNS: POLITICS, POLICIES, AND TRAJECTORIES OF CHANGE 61, 68 (Maxwell A. Cameron & Eric Hershberg eds., 2010) (analyzing the community councils and recall referenda within the Venezuelan constitution, and contextualizing it within the "mobilization function" of Chavez's project). There is no doubt that the Constitutions contain novel clauses, such as presidential recall provisions and provisions including civil society groups in judicial selection, that might be very useful as the basis for a more participatory democratic order. Whether in fact these provisions functioned to create a more participatory order is more contestable. *See, e.g.*, ALLAN R. BREWER-CARÍAS, DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT 227-30 (2010) (noting that the provisions allowing civil society groups to participate in the selection of Supreme Court justices were not implemented).

[12] *See, e.g.*, Guillermo O'Donnell, *Introduction to the Latin American Cases*, *in* TRANSITIONS FROM AUTHORITARIAN RULE: LATIN AMERICA 3, 5 (Guillermo O'Donnell et al. eds., 1986) (noting Venezuela and Colombia as exceptions).

[13] Even in the classic form of military dictatorship, autocracy and constitutionalism are not as opposed as is often thought. Constitutionalism may be valuable for authoritarian regimes in helping to organize and formalize power, increase legitimacy, control subordinate officials, and attract foreign investment. *See* TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 13-15 (2007) (showing how the Egyptian Constitutional Court was given considerable interpretative power over the

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in 1973 by bombing and storming the presidential palace, closing the Congress, and suspending most parts of the existing constitution.[14] The country lived under no real constitutional order until 1980, when the military regime adopted a new text.[15]

However, the number of coups has fallen sharply since their heyday in the 1960s.[16] The end of the Cold War reduced the tolerance of powerful states for obviously non-democratic regimes, and it also shifted cultural norms at the international level towards recognition of the importance of democracy.[17] Military involvement has become particularly disfavored, especially in regions such as Latin America with a long history of such involvement. Moreover, as noted in more detail in Part III, many regions have adopted so-called "democracy clauses," punishing states that overthrow democratic regimes in flagrant violation of constitutional norms.[18] This has pushed would-be autocrats towards more constitutional methods of change. Further, many of the coups that have happened recently have been less clearly anti-democratic than traditional military takeovers. Recent empirical research has shown that while Cold War era coups tended to end in long-running military dictatorships, more recent coups have tended to lead to rapid restorations of civilian rule.[19] And as Ozan Varol has

constitution in order to attract foreign investment and to control interpretations of Islamic provisions); Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1, 4-11 (Tom Ginsburg & Tamir Moustafa eds., 2008) (laying out the reasons why authoritarian actors might establish judicial review and independent courts).

[14] *See* Manuel Antonio Garretón, *The Political Evolution of the Chilean Military Regime and Problems in the Transition to Democracy*, *in* TRANSITIONS FROM AUTHORITARIAN RULE: LATIN AMERICA, *supra* note 12, at 95-98.

[15] *See id.* at 109-10.

[16] *See, e.g.*, Jonathan M. Powell & Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 48 J. PEACE RES. 249, 255 (2011), *available at* http://www.uky.edu/~clthyn2/powell-thyne-JPR-2011.pdf (finding "a fairly clear decline in the total frequency of coup attempts over time," although noting that the success rate has increased in the past ten years or so).

[17] *See, e.g.*, Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT'L L. 507, 511-12 (2011).

[18] *See* Stephen J. Schnably, *Constitutionalism and Democratic Governance in the Inter-American System* [hereinafter *Constitutionalism*], *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 155, 166-68 (Gregory H. Fox & Brad R. Roth eds., 2000) (exploring the role of the democracy clause and electoral monitoring within the Organization of American States); *infra* Part III.A.

[19] *See* Nikolay Marinov & Heins Goemens, *Coups and Democracy*, 44 BRIT. J. POL. SCI. (forthcoming 2014) (manuscript at 24), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270631.

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recently shown, some coups — such as the one ending military rule in Egypt — even have pro-democratic effects.[20] Thus the unconstitutional coup, aside from being of declining significance, may also be overstated as a danger in the modern world. It is, at any rate, not the best basis for building modern constitutional design and theory.

The alternative route of taking power constitutionally, and then using that power to overthrow democracy, is itself not a new idea. Indeed, perhaps the paradigm anti-canonical event around which modern comparative constitutional law was built — the Nazi overthrow of Weimar Germany — occurred using arguably constitutional means.[21] In a terrible economic and unstable political environment, with a series of coalition governments falling in quick succession, the Nazis moved from a fringe party to a major movement. Hitler was appointed chancellor of a coalition government in 1933, and then convinced both the President and the Reichstag, itself, to give him the dictatorial powers he needed to create a totalitarian state.[22] This nightmare of constitutionalism being used to destroy democracy informed much of post-war constitutional thought, including the concept of "militant democracy" that is considered in more detail in Part II.[23]

Nonetheless, there are major differences between the Nazi takeover of Weimar Germany and the abusive constitutional tools considered in this Article. Most importantly, the Nazis replaced the Weimar Republic with a thoroughly authoritarian regime, thus using constitutionalism to completely destroy democracy. The existence of clearly authoritarian regimes has decreased through time, again largely because of the changes in the international environment surveyed above.[24] Yet not of all these regimes have become fully democratic —

[20] Ozan Varol, *The Democratic Coup d'Etat*, 53 HARV. INT'L L.J. 291, 294 (2012) (exploring coups in Portugal, Turkey, and Egypt that had pro-democratic effects, and noting that "some military coups are distinctly more democracy-promoting than others").

[21] *See generally* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997) (noting that the Nazi takeover of the Weimar Republic occurred using legal means).

[22] *See, e.g.*, David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 598 (2009) (describing how the Nazis used their power within the government to "eliminate opposition and eventually repeal the entire Weimar constitution itself"); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1811 (2010) (noting the use of emergency powers by the Nazis in the Weimar Constitution).

[23] *See infra* Part II.A.

[24] For example, data from Freedom House shows that those regimes classified as

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instead, many have become what political scientists call "competitive authoritarian," "electoral autocracies," or simply "hybrid" regimes, melding some aspects of democracy with some aspects of authoritarianism.[25]

These regimes generally satisfy international actors in that they are sufficiently democratic to avoid sanctions and other consequences — elections are held, and they are not mere shams. There is enough electoral competition for opposition forces to compete and occasionally win.[26] But at the same time, the deck is systematically stacked against those trying to unseat incumbents through a variety of means: government control of media, harassment of opposition politicians and operatives, use of state patronage resources to secure votes, and, in some cases, electoral fraud.[27] As a result, incumbents currently in power tend to stay in power, and mechanisms of vertical accountability become distorted.

"not free" have dropped steadily from forty-six percent of all countries in 1972 to twenty-four percent in 2012. During the same time period, the percentage of regimes classified as "partly free" — a reasonable proxy for the "hybrid regimes" discussed in this paper — has increased from twenty-five percent to thirty percent. *See* FREEDOM HOUSE, FREEDOM IN THE WORLD 2013, at 24 (2013), *available at* http://www.freedomhouse.org/sites/default/files/FIW%202013%20Charts%20and%20Graphs%20for%20Web.pdf.

[25] *See, e.g.*, STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 5 (2010) ("Competitive authoritarian regimes are civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents."); Larry Diamond, *Thinking About Hybrid Regimes*, J. DEMOCRACY, Apr. 2002, at 21-22 (noting that regimes like Russia, Venezuela, Turkey, and the Ukraine have elections, but yet did not appear to be truly democratic); Andreas Schedler, *The Logic of Electoral Authoritarianism*, *in* ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION 1, 3-5 (Andreas Schedler ed., 2006) (coining and explaining the concept of "electoral authoritarianism"). There is also a related concept discussed by Guillermo O'Donnell, "delegative democracy," where leaders are subject to vertical accountability via elections but not horizontal accountability via checks by courts or legislatures. *See* Guillermo O'Donnell, *Delegative Democracy*, J. DEMOCRACY, Jan. 1994, at 55-56. The "delegative democracy" concept, however, is different from the kind of regimes discussed here because it at least assumes a fair shot to periodically oust incumbents from office.

[26] *See* LEVITSKY & WAY, *supra* note 25, at 12 (noting that incumbents in competitive authoritarian regimes "fear a possible opposition victory" and must "work hard to thwart it").

[27] *See id.* (noting that "unfair competition" is the key element of the "competitive authoritarian" regime type, with opposition subject to "surveillance, harassment, and occasional violence" and with electoral and judicial authorities generally deployed against them rather than acting as neutral arbiters).

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Moreover, in these regimes the dominant political actors and forces tend to control not only the branches of government, but also the mechanisms of horizontal accountability that are supposed to check political actors. Thus, institutions like courts, ombudsmen, attorney general's offices, and electoral commissions all tend to be controlled by incumbents.[28] Rather than serving as independent checks on government power, these institutions are actively working on behalf of their political projects. The result is not only to undermine electoral competition, but also to sharply limit the extent of protection of rights for minority groups within these systems. The core problem, then, is that it is fairly easy to construct a regime that looks democratic, but in actuality is not fully democratic, at least along two important dimensions: vertical and horizontal checks on elected leaders and rights protection for disempowered groups. A regime with these two characteristics — a relative absence of accountability and a lack of rights protection — is meaningfully less democratic than a regime with higher levels of vertical and horizontal accountability and more meaningful rights protection. Moreover, an absence of accountability is plausibly associated with other ills, like increased levels of corruption. In the examples below, I demonstrate how incumbent regimes in three countries — Colombia, Venezuela, and Hungary — have all attempted to use mechanisms of constitutional change to move towards such a regime.[29]

### *B. Abusive Constitutionalism by Amendment: Colombia*

Colombia has historically maintained a semblance of democracy, largely by relying on regular elections and rotation in the presidency, with only a small number of historical exceptions. The country, for example, has had far fewer and shorter interludes of military authoritarianism then its neighbors.[30] Also, historically, presidents have generally been limited to a single term in office, and this has

[28] *See id.* at 27-28.

[29] I am not claiming that manipulation of constitutional rules by powerful incumbents is a new phenomenon. Latin American constitutions, for example, have a long history of being manipulated for the gain of particular actors. *See, e.g.*, Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 4 (2006) (lamenting "[t]he ease with which constitutions can be changed or ignored" in Latin America).

[30] *See* DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 284-85 (1993).

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helped to maintain the democratic order by preventing the emergence of strongmen with a continuous hold on the office.[31]

However, President Alvaro Uribe Velez tested this paradigm after winning election in 2002. Like Hugo Chavez in Venezuela, he won as an outsider, running against the traditional two-party system.[32] He gained substantial popularity as a result of the perception that he was responsible for a marked drop in violence in the country,[33] and he leveraged his popularity in order to push through an amendment to the Constitution allowing him a second term in office.[34] The Colombian Constitution is fairly easy to amend, requiring only an absolute majority of Congress in two consecutive sessions, and Uribe was easily able to surpass this threshold.[35]

A group of citizens challenged the law in front of the Colombian Constitutional Court, alleging that there were procedural irregularities and that the amendment constituted a "substitution of the Constitution" that could not be carried out by amendment, but instead only by a Constituent Assembly.[36] On the second point, they emphasized that the design of the Constitution was set up for one-term presidents, and that by holding more than one term Uribe would

[31] *See id.* at 284.

[32] *See* Kurt Weyland, *Neopopulism and Neoliberalism in Latin America: How Much Affinity?*, 24 THIRD WORLD Q. 1095, 1111 (2003) (labeling Uribe a populist who won election outside of the traditional political party system). As in Venezuela, the country's traditional party system had been losing legitimacy through time, particularly since the enactment of a new Constitution in 1991. *See* Eduardo Pizarro Leongómez, *Giants with Feet of Clay: Political Parties in Colombia*, *in* THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES 78, 78-79 (Scott Mainwaring et al. eds., 2006).

[33] *See, e.g.*, Ann Mason, *Colombia's Democratic Security Agenda: Public Order in the Security Tripod*, 26 SEC. DIALOGUE 391, 396-98 (2003) (explaining Uribe's "democratic security" policy and its results in reducing guerrilla violence).

[34] *See* Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1598 & n.76 (2011).

[35] *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 375 (requiring a simple majority of Congress in the first round and an absolute majority in the second round).

[36] *See* Corte Constitucional [C.C.] [Constitutional Court], Octubre 19, 2005, Sentencia C-1040/05, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2005/C-1040-05.htm. The substitution of the constitution doctrine holds that certain amendments are substantively unconstitutional because they effectively create a new constitution, rather than amending the existing one. These changes must be done through Constituent Assemblies and replacement of the constitution, rather than via amendment. *See infra* Part III.B (discussing the doctrine). *See generally* Carlos Bernal-Pulido, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339 (2013) (examining relevant jurisprudence and developing a justification of the doctrine).

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be allowed to appoint many of the officers who were responsible for checking him.[37] They also noted that Uribe would face substantial electoral advantages because of his office, and thus would be difficult to dislodge. The Court responded that two-term presidencies were fairly normal internationally, that the extra four years would not allow him to capture all or most control institutions, and that special legal safeguards taken during the re-election campaign would help to ameliorate Uribe's advantages.[38] However, it also warned that the allowance of additional terms — beyond two — may well be unconstitutional, because the electoral advantages enjoyed by the incumbent would grow, and horizontal checks on his power would erode.[39]

The Court was forced to face this situation four years later, after Uribe had won a second term. Supporters of the still-popular President worked to pass an amendment allowing a third term through Congress, and the Congress approved a referendum on whether three consecutive terms in office should be allowed.[40] If given to the public, the referendum almost certainly would have passed, since Uribe continued to enjoy approval ratings well above sixty percent.[41] The Constitutional Court was again faced with the problem of whether the amendment was constitutional, both procedurally and substantively — this time it struck it down on both grounds.[42] Procedurally, the Court found problems with the financing of the initiative and with its passage through Congress. Substantively, it noted in detail the ways in which Uribe's re-election would allow him to influence the selection of virtually all officials which were supposed to be checking him, and

[37] Other institutions often have staggered terms so that no single president will be able to appoint all of them. For example, the national ombudsman (Defensor del Pueblo), General Prosecutor, and Public Ministry (Procuraduria) have four-year terms that are not coterminous with that of the President. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 249, 281. Justices of the Council of State, Supreme Court, and Constitutional Court have eight-year terms. *See id.* art. 233.

[38] *See* C.C., Octubre 19, 2005, Sentencia C-1040/05, §§ 7.10.4.1–7.10.4.2, G.C.C. (Colom.). The amendment included a requirement that Congress pass a statutory law regulating the rights of the opposition, and in order to help ensure a level playing field. *See* L. 2/04, diciembre 28, 2004, DIARIO OFFICIAL [D.O.] No. 45.775 (Colom.).

[39] *See* C.C., Sentencia C-1040/05, §§ 7.10.4.1–7.10.4.2.

[40] *See* L. 1354/09, septiembre 8, 2009, D.O. No. 47.466 (Colom.).

[41] *See Popularidad de Alvaro Uribe cae 6 puntos y se ubica en 64 por ciento, su nivel mas bajo en 7 anos*, EL TIEMPO (Colom.) (Nov. 6, 2009), http://www.eltiempo.com/archivo/documento/CMS-6527007http://www.eltiempo.com/archivo/documento/CMS-6527007.

[42] *See* C.C., febrero 26, 2010, Sentencia C-141/10, pt. VI, G.C.C. (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm.

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thus would have "deep repercussions on the institutional design adopted by the Constituent Assembly."[43] Moreover, it noted that the advantages of incumbency would potentially grow over time, making Uribe increasingly difficult to dislodge from the presidency. In short, the Court held that the second re-election constituted a "substitution of the Constitution" because it would create such a strong presidency as to weaken democratic institutions.[44]

The decision was complied with, and Uribe did not run for a third term.[45] It is probably too much to say that the Court succeeded in preventing Colombia from becoming a competitive authoritarian regime; unlike Hugo Chavez in Venezuela or Rafael Correa in Ecuador, Uribe did not launch all-out attacks against most of the horizontal checks on his power, or threaten to remake the entire institutional order. Further, the Colombian regime contains a high number of relatively autonomous checking institutions, and it would not have been easy for Uribe to pack all of these institutions.[46] But the Court probably did prevent a significant erosion of democracy by preventing a strong president from holding onto power indefinitely.

### *C. Abusive Constitutionalism by Replacement: Venezuela*

President Hugo Chavez won an election in Venezuela in 1998 with fifty-six percent of the vote, running as an independent against the country's traditional two-party system.[47] The country had enjoyed a fairly strong two-party democracy for several decades, but, by the time Chavez was elected, the traditional two parties had lost support and were battling a series of corruption scandals.[48] Still, Chavez faced

[43] *See id.* §§ 6.3.6.1, 6.3.7 (explaining the influence that a twelve-year presidency would have on the Central Bank, Public Ministry, Constitutional Court, Prosecutor, and other institutions).

[44] *See id.*

[45] *See* Eduardo Posada-Carbó, *Colombia After Uribe*, J. DEMOCRACY, Jan. 2011, at 137.

[46] *See, e.g.*, David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 338-39 (2010) (describing the role of the Constitutional Court and other institutions like the Ombudsman within the Colombian constitutional order).

[47] *See* Michael Coppedge, *Venezuela: Popular Sovereignty Versus Liberal Democracy*, *in* CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 165, 167 (Jorge I. Dominguez & Michael Shifter eds., 2nd ed. 2003).

[48] The country had lived under a pacted two-party democracy for several decades, with the two major parties alternating power but excluding certain social groups — particularly on the right — from exercising political control. The system enjoyed substantial legitimacy for long periods of time, but, by the time Chavez was elected,

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opposition from members of the two parties, who continued to control majorities in the national Congress, Supreme Court, state and local governments, and other institutions.[49] With the opposition controlling most other institutions, Chavez was only weakly capable of carrying out his agenda.

In order to neutralize this opposition, Chavez argued that the existing Constitution should and could be replaced. The existing Venezuelan Constitution provided only for amendment by Congress; like most texts it said nothing about its own replacement.[50] But Chavez argued that the "people" retained an inherent constitutional power to replace their constitutional text, and proposed a referendum to determine whether elections for a Constituent Assembly should be held. The Supreme Court agreed with the proposal, noting that the public retained an "original constituent power" that was "prior and superior to the established judicial regime," and thus had the power to replace their existing constitutional text.[51] In subsequent cases, however, the Court vacillated in defining the powers possessed by the Assembly. It attempted to limit its power by holding that the Assembly was "bound to the spirit of the Constitution in force, and therefore . . . limited by the fundamental principles of the Democratic State of Law."[52] These limitations never proved effectual, though, because the

had lost much of this due to economic crisis and because of a sense that the system was serving only the interests of insiders. *See generally* MICHAEL COPPEDGE, STRONG PARTIES AND LAME DUCKS: PRESIDENTIAL PARTYARCHY AND FACTIONALISM IN VENEZUELA (1994) (explaining how the Venezuelan "partyarchy" over time eroded the legitimacy of the regime).

[49] *See* Coppedge, *supra* note 47, at 179 tbl.8.5 (showing that opposition group continued to hold 118 of 188 seats in the House and 67 of 100 seats in the Senate).

[50] *See* CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA, arts. 245, 246 (1961).

[51] *See* Caso. Junta Directiva de la Fundación para los Derechos Humanos, Corte Suprema de Justicia: Sala Político-Administrativa [Supreme Court of Justice: Political-Administrative Chamber], 19 de Enero, 1999 (Venez.), *reprinted in* 77-80 REVISTA DE DERECHO PUBLICO 56, 56-57 (1999).

[52] Caso. Gerardo Blyde Pérez, Corte Suprema de Justicia: Sala Político-Administrativa [Supreme Court of Justice: Political-Administrative Chamber], 23 de Marzo, 1999 (Venez.), *available in* 77-80 REVISTA DEL DERECHO PUBLICO 83, 84 (1999). This language was used in a clarification of a ruling in an earlier case in which the Court struck down the referendum questions formulated by Chavez. The second question asked the public to vote on the convocation of a Constituent Assembly under electoral rules that would subsequently be formulated by him. *See* Caso. Gerardo Blyde, contra la Resolucion Nº 990217-32 del Consejo Nacional Electoral (17-2-99), Corte Suprema de Justicia: Sala Político-Administrativa [Supreme Court of Justice: Political-Administrative Chamber], 18 de Marzo, 1999 (Venez.), *reprinted in* 77-80 REVISTA DE DERECHO PUBLICO 73, 78-82 (1999). The Court held that this formula was unconstitutional, because it would not guarantee that the Assembly would represent

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Court never used them to strike down an important act of Chavez or of the Assembly.[53] Once the Assembly had been actually convoked, the Court would revert to its position that the Assembly was invested with "original constituent power," and thus could not be controlled by existing institutions of state.[54]

Thus, Chavez wrote the rules for the election to the Assembly on his own, and managed to engineer a set of electoral rules that were immensely favorable to him: his party won sixty percent of votes, but took over ninety percent of seats in the Assembly overall.[55] Once convoked, the Assembly focused on shutting down institutions still controlled by the old two-party system: it suspended the Congress, created a Council charged with purging the judiciary, removed state-level officials, and eventually closed the Supreme Court itself.[56] Some of these actions were challenged in front of the Supreme Court, but applying the "original constituent power" doctrine, it refused to step in.[57] Further, the new Constitution promulgated by Chavez abolished

"the true popular will." *Id.* at 80.

[53] The Court struck down symbolic measures, like one that defined the Assembly as "an original power that carries popular sovereignty." *See* Caso. Gerardo Blyde vs. Consejo Supremo Electoral, Corte Suprema de Justicia: Sala Político-Administrativa [Supreme Court of Justice: Political-Administrative Chamber], 13 de Abril, 1999 (Venez.), *reprinted in* 77-80 REVISTA DE DERECHO PUBLICO 85, 85 (1999). In another case, the Court held that statements made by Chavez on television failed to make clear that the Assembly was subject to control by the existing constitutional order. *See* Caso. Alberto Franceschi y Otros, Corte Suprema de Justicia: Sala Político-Administrativa [Supreme Court of Justice: Political-Administrative Chamber], 21 de Julio, 1999, (Venez.), *reprinted in* 77-80 REVISTA DE DERECHO PUBLICO 104, 106, 110 (1999).

[54] *See* Caso. Vicepresidente del Congreso de la República vs. Asamblea (decreto 25-8-99), Corte Suprema de Justicia: Sala Plena [Supreme Court of Justice: Plenary Session], 14 de Octubre, 1999, (Venez.), *reprinted in* 77-80 REVISTA DE DERECHO PUBLICO 111, 111 (1999).

[55] Renata Segura & Ana María Bejarano, *¡Ni una asemblea más sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes*, 11 CONSTELLATIONS 218, 225, 228-30 (2004).

[56] As a prelude to these actions, Chavez placed his mandate at the disposal of the Assembly, stating that it had the power to remove him from his post if it wished, since it possessed sovereignty over all institutions of state. The surprised Assembly debated the motion and "ratified" Chavez as president with zero "no" votes and three abstentions. *See Gaceta Constitucional*, No. 5, August 9, 1999.

[57] The closure of Congress was challenged in front of the Supreme Court, but the full court refused to declare the action unconstitutional. *See Caso. Vicepresidente del Congreso de la República*, *reprinted in* 77-80 REVISTA DE DERECHO PUBLICO, at 120. As the prominent Venezuelan legal scholar Allan Brewer-Carias noted, by so ruling the Court essentially signed its own "death sentence," paving the way for the abolition of all other institutions that existed under the old order. *See* Allan R. Brewer-Carias, *La*

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the single four-year presidential term-limit found in the existing constitution and replaced it with an allowance of two terms of six years each, effectively allowing Chavez to stay in power for twelve more years.[58] It also greatly increased executive power, turning what had been one of the weakest presidents in Latin America into one of the strongest in the region.[59] The entire constitution-making process was completed in a span of only a few months, and since Chavez controlled the Assembly, there was virtually no debate on most provisions.[60]

The 1999 constitution-making process thus gave Chavez a legal means to sweep the deck clean, removing opposition figures from power and replacing them with institutions that he could control. In that sense, it helped to shepherd in a competitive authoritarian regime, where Chavez maintained power continuously until his death in 2013 and was able to control most other institutions in the country. He had subsequently been able to use his power over the state to push through other constitutional amendments that increased his power, such as a 2009 package that removed term limits entirely.[61]

This tactic — replacing an existing constitution as a way to consolidate power — has spread beyond Chavez to a variety of other regimes in Latin America. Both Rafael Correa in Ecuador and Evo Morales in Bolivia similarly relied on constitutional replacement as a way to sweep away horizontal checks on their power and to consolidate competitive authoritarian regimes.[62] And as explored in

*Configuración Judicial del Proceso Constituyente en Venezeual de 1999: O de Cómo el Guárdian de la Constitución Abrió el Camino Para Su Violación y Para su Propia Extinción*, *reprinted in* 77-80 REVISTA DE DERECHO PUBLICO 453, 502 (1999).

[58] *See* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 230. (1999).

[59] *See* Katja S. Newman, Constitutional Coups: Advancing Executive Power in Latin American Democracies 27-29 (May 7, 2011) (unpublished manuscript) (on file with author), *available at* http://www.democracy.uci.edu/files/democracy/docs/conferences/grad/2011/Newman%20CSD%202011%20Grad%20Conf%20CONSTITUTIONAL%20COUPS.pdf (finding based on an index that presidential power was increased by 121%).

[60] *See* Landau, *Constitution-Making*, *supra* note 1, at 941-49 (describing the constitution-making process in Venezuela).

[61] *See, e.g.*, Allan R. Brewer-Carías, Venezuela 2009 Referendum on Continuous Reelection: Constitutional Implications 4 (Feb. 9, 2009) (unpublished manuscript) (on file with author), *available at* http://ilas.columbia.edu/images/uploads/workingpapers/Allan_Brewer-Carias-_Venezuela_2009_Referendum_on_Continuous_Re-Election,_Constitutional_Implications.pdf (noting that the National Assembly used the Constitutional Amendment procedure to "establish the possibility for the indefinite and continuous reelection of the President of the Republic").

[62] *See, e.g.*, Landau, *Constitution-Making*, *supra* note 1, at 949-58 (describing constitutional replacement in Bolivia).

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more detail below, Manuel Zelaya attempted to pursue a similar tactic in Honduras before he was removed from power.[63]

The Ecuadorian case, for example, is illustrative of the same basic strategy as the one used by Chavez in Venezuela. President Rafael Correa won election as an outsider to another discredited political system with fifty-two percent of the vote, and his movement ran against the system to such an extent that it did not seek any congressional seats.[64] Once elected, Correa threatened the Congress with dissolution, and proposed a referendum that would achieve that goal and would also call a new Constituent Assembly to replace the existing Constitution. Congress, faced with this pressure, caved, and by majority vote allowed a referendum on whether a Constituent Assembly should be called.[65] Correa, however, then unilaterally changed the terms of the referendum to include additional provisions, such as one calling for the immediate dissolution of the Congress. When Congress responded by beginning impeachment proceedings against the President, he had the Supreme Electoral Tribunal — which he controlled — remove fifty-seven members of Congress.[66]

As in Venezuela, the resulting constitutional text created a much stronger presidency.[67] As importantly, it gave Correa an opportunity to pack all of the various institutions (including the Congress and Constitutional Court) that would have checked his power. The result is another competitive authoritarian regime; Ecuador continues to hold elections, but the opposition is now facing a playing field that is strongly tilted against it.[68]

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[63] *See infra* Part III.A.

[64] *See* Agustín Grijalva, Courts and Political Parties: The Politics of Constitutional Review in Ecuador 151-52 (April 14, 2010) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with author), *available at* http://d-scholarship.pitt.edu/7334/1/grijalva_agustin_2010_etd.pdf.

[65] *See* Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, J. DEMOCRACY, Apr. 2008, at 51.

[66] *See id.* at 52. Moreover, when the Constitutional Tribunal attempted to intervene on behalf of the removed Congressmen, the new Congress — which Correa controlled — simply removed the justices by claiming that their terms had expired. *See* Grijalva, *supra* note 64, at 153.

[67] *See* Newman, *supra* note 59, at 27-28.

[68] Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in the Andes*, 20 DEMOCRATIZATION 107, 121 (2013). Conaghan instead refers to Ecuador as a "plebiscitary" democracy, explaining how Correa succeeded in weakening all other branches of government and governing by taking his case directly to the people. *See* Conaghan, *supra* note 65, at 47-48. Regardless of label, however, Correa's actions have weakened democracy in a particular way.

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### *D. A Combination of Reform and Replacement: Hungary*

In Hungary, the Fidesz Party won the Parliamentary elections of 2010 with fifty-three percent of the vote. They ousted the previously governing Socialists, who had presided over a deteriorating economy. However, because of the way that the Hungarian voting rules worked, the fifty-three percent of the vote translated into sixty-eight percent of the seats, a sufficient supermajority to amend the existing Constitution.[69] The Fidesz Party has had a checkered and opportunistic ideological past: it began as a Libertarian party after the transition from Communism, but became a Conservative party after suffering early electoral defeats.[70]

Although the Fidesz Party had not campaigned on a platform of constitutional change, it began moving towards radical constitutional reform after winning the 2010 election. It first enacted a series of constitutional amendments — ten in the closing months of 2010 — that weakened institutions serving to check parliamentary majorities, particularly the Constitutional Court.[71] The Parliament reformed the Constitution to give Fidesz members more unilateral power over the nomination process, and after the Court struck down a retroactive tax on bonuses received by departing civil servants, the Parliament responded by passing a constitutional amendment stripping most of the Court's jurisdiction over fiscal and budgetary matters.[72] The Court was asked to strike down this amendment on the ground that it was substantively unconstitutional because it was severely at variance with the existing constitutional order, but a majority of the Court declined to adopt that doctrine and held that it could only review constitutional amendments for procedural problems.[73]

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[69] The voting rules in place gave majoritarian boosts to the party gaining a plurality of votes, thus helping the Fidesz gain extra seats. *See* Miklós Bánkuti et al., *Disabling the Constitution*, J. DEMOCRACY, July 2012, at 139.

[70] *See, e.g.*, Csilla Kiss, *From Liberalism to Conservatism: The Federation of Young Democrats in Post-Communist Hungary*, 16 E. EUR. POL. & SOC'Y 739, 741-44 (2002) (tracing the ideological shifts in the Fidesz).

[71] The Parliament also passed a number of laws that had important effects on the democratic order. For example, a set of media laws concerned critics, as they potentially reduced the independence of media outlets. *See, e.g.*, Judy Dempsey, *Hungary Waves off Criticism Over Media Laws*, N.Y. TIMES (Dec. 25, 2010), http://www.nytimes.com/2010/12/26/world/europe/26hungary.html?_r=0.

[72] *See* Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182, 191-92 (2012).

[73] *See id.* at 195-96. The majority of the Court suggested that there were immutable parts of the constitutional order, but held that it was beyond its power to actually enforce those limits.

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The Fidesz majority then went forward with a plan for constitutional replacement — using its two-thirds majority in Parliament, it began writing an entirely new text.[74] The process was widely criticized for not being inclusive; the party used a parliamentary device to evade most deliberation on the bill, and almost no input was received from opposition political forces.[75] As in the Venezuelan case, the new Constitution both undermines horizontal checks on the majority and may help it to perpetuate itself in power indefinitely. The new Constitution expands the size of the Constitutional Court, thus giving the ruling party additional seats to fill.[76] It also creates a new National Judicial Office, controlled by the party, and one with broad powers over both judicial selection and the assignment of cases within the ordinary judiciary.[77] The judicial

[74] Andrew Arato, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?*, 26 S. AFR. J. HUM. RTS. 19, 43 (2010). The Hungarian constitutional situation was peculiar; the country never wrote a new constitution when it transitioned to democracy, but instead maintained the old, Communist-era constitution with massive amendments. The old Constitution thus openly contemplated its replacement, but no such replacement materialized during the first twenty years of the democratic regime. *See id.* at 27-28 (exploring why no permanent constitution was ever enacted). The Fidesz also used its two-thirds majority to amend a part of the old Constitution, which had probably already ceased to have any effect, requiring approval of four-fifths of Parliament in order to "establish the rules and procedures for the preparation of a new Constitution." *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] (1995), art. 24, cl. 5 (stating that the four-fifths requirement would expire when the Parliament elected in 1994 ended). *But see* Andew Arato, *Arato on Constitution-Making in Hungary and the 4/5ths Rule*, COMP. CONSTS. BLOG (Apr. 6, 2012, 7:19 AM), http://www.comparativeconstitutions.org/2011/04/arato-on-constitution-making-in-hungary.html (arguing that the four-fifths rule might still have life).

[75] *See* EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), *Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution*, 86th Sess., Op. No. 614/2011, at 4-5 (Mar. 28, 2011), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)001-e (raising concerns about the lack of opposition participation in the process, the lack of transparency, and the tight time-frame within which the Constitution was being drafted).

[76] *See* MAGYARORSZÁG ALAPTÖRVÉNYE [FUNDAMENTAL LAW OF HUNGARY] [CONSTITUTION] (2011), art. 24, § 4 (expanding the size of the Court from eleven to fifteen members).

[77] Note that the National Judicial Office was created and defined by a cardinal law, rather than by the Constitution. The Constitution required the creation of cardinal laws to govern various areas, and the Constitution requires a two-thirds majority to either write or amend these cardinal laws. *Id.* art. T, § 4; *see also* EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, 90th Sess., Op. No. 663/2012, at 7-8 (Mar. 19, 2012), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e

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retirement age was reduced from seventy to sixty-two, giving the National Judicial Office a large number of vacancies to fill in a short period of time.[78] Other key institutions, like the Electoral Commission, Budget Commission, and Media Board, have been re-staffed with Fidesz loyalists and often given very long terms of twelve years.[79] Finally, new rules adjust the electoral districts in ways that would have substantially increased their share of the vote in each of the past three elections, thus potentially making the Fidesz harder to dislodge in the future.[80]

This effort has provoked some responses both domestically and internationally. Domestically, the Constitutional Court for the time-being retains sufficient independence to issue some important rulings against the regime. For example, the Court struck down the effort to lower the retirement age to sixty-two, although it issued a weak remedy that appeared to have no effect on the judges already removed from the bench.[81] It also struck down a new voter-registration law that seemed designed to further tilt the electoral balance in the Fidesz's

(expressing concerns about the institution).

[78] EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Opinion on the New Constitution of Hungary*, Op. No. 621/2011, at 22 (June 20, 2011), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)016-e [hereinafter *New Constitution of Hungary*] (expressing concern over this development because it "may undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary").

[79] *See, e.g.*, Bánkuti et al., *supra* note 69, at 140-44 (explaining how these institutions were packed). Yet other institutions, like the National Ombudsman's Office, were greatly weakened. *Id.* at 144.

[80] For an analysis of the new electoral districts, see, for example, Viktor Szigetvári et al., Beyond Democracy — The Model of the New Hungarian Parliamentary Electoral System 1, 12-13 (Nov. 24, 2011) (unpublished manuscript) (on file with author), *available at* http://lapa.princeton.edu/hosteddocs/hungary/Beyond%20democracy%20-%2027%20Nov%202011.pdf (finding that the Fidesz would have won each of the last three elections, including two that it actually lost, if the new electoral districts had been in place).

[81] *See* Kim Lane Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Retirement Age*, VERFASSUNGS BLOG (Aug. 9, 2012), http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-i/#.UQiH2Wfiv3U (noting that judicial reinstatement was now winding its way through the ordinary judiciary with no certainty of success, and that the newly appointed judges would not be removed at any rate). Note that the European Court of Justice later issued a decision striking down the same move as age discrimination which was not proportionate to the achievement of any legitimate social policy. *See* Case C-286/12, Comm'n v. Hungary, 2012 CELEX WL 612CJ0286 (Nov. 6, 2012).

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favor.[82] Internationally, various institutions of the European Union and the Council of Europe have searched for an appropriate response. The Venice Commission, created to give constitutional assistance to the transitional democracies in Eastern Europe, has criticized certain parts of the new text and related laws,[83] while enforcement proceedings were brought against certain elements of the program, especially those that reduced the independence of the Central Bank and lowered the retirement age for judges to sixty-two.[84] In response, the Fidesz has modified some of its policies.[85]

We do not know whether the result of the Hungarian case will be the creation of a competitive authoritarian regime, but the intent was clearly to move in that direction. It may be difficult for a member of the European Union to move too far in the direction of authoritarianism, although it is startling how successful the Fidesz has been in carrying out this goal within a short period of time.

### *E. Abusive Constitutionalism and Modern Authoritarianism*

Why is it that constitutionalism, which is normally associated with the rise and consolidation of democratic regimes, is in these cases so strongly associated with moves towards competitive authoritarian or hybrid regimes? Scholars have doubted the value of constitutional rules to the competitive authoritarian project. For example, political scientists Steven Levitsky and Lucan Way argue that formal rules are relatively unimportant to competitive authoritarian regimes because these regimes tend to rely on informal sets of norms to perpetuate

[82] Margit Feher, *Hungary Court Throws out Mandatory Voter Registration*, WALL ST. J. EMERGING EUR. BLOG (Jan. 4, 2013, 3:00 PM), http://blogs.wsj.com/emergingeurope/2013/01/04/hungary-court-throws-out-mandatory-voter-registration/.

[83] *See* EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), *New Constitution of Hungary*, *supra* note 78, at 28-29 (giving a balanced assessment of the new constitution, praising certain elements while expressing serious concern about the reforms to the judiciary and certain other elements).

[84] *See* sources cited *supra* note 81 (explaining the European Court of Justice case striking down the lowered mandatory retirement age for judges); *see also EU Opens Legal Action Against Hungary Over New Laws*, BBC NEWS, http://www.bbc.co.uk/news/world-europe-16593827 (last updated Jan. 17, 2012, 10:40 AM).

[85] *See, e.g.*, Andrew Clapham, *Council of Europe Cites Hungary's Progress on Judiciary, Media*, BLOOMBERG (Jan. 29, 2013, 4:49 AM), http://www.bloomberg.com/news/2013-01-29/council-of-europe-cites-hungary-s-progress-on-judiciary-media.html (noting amendments to the laws in both areas in light of discussions with European officials); *EU Closes Central Bank Infringement Case*, EUBUSINESS.COM (July 19, 2012, 3:46 PM), http://www.eubusiness.com/news-eu/hungary-economy.ht0/ (stating that amendments to the Central Bank law had allayed the concerns of the European Commission).

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themselves in power.[86] They argue that in these kinds of regimes, the formal rules "designed to constrain governments [are] frequently circumvented, manipulated, or dismantled."[87] As an example, competitive authoritarian regimes tend to possess democratic-looking constitutions with structural features such as the separation of powers, but take informal measures to neutralize the value of those checks. Rulers can appoint friendly judges to courts, and can neutralize judges representing opposing interests by, for example, bribing them or threatening them. Similarly, these regimes might hold elections, and because of monitoring and other incentives, might avoid blatant fraud on election day itself. But they rely on state control over the media and over the largesse of state resources, as well as intimidation and harassment of opposition figures, to nonetheless make incumbents very difficult to dislodge.[88] There is no doubt, then, that these regimes do rest largely on informal sets of norms and incentives.

Yet the examples given above, as well as other examples drawn upon by scholars, offer ample evidence that constitutionalism is often a key part of these projects.[89] It is a mistake to ignore the importance of formal constitutional rules to hybrid regimes. For one thing, formal constitutional rules define incumbents' tenure in office, power over other institutions, and other variables. Thus in Colombia, Uribe's ability to leverage informal mechanisms, such as patronage, to control other institutions of state, like courts and ombudsmen, was dependent on his ability to remain in office indefinitely, and thus he continuously sought constitutional reform in order to allow presidential re-election.[90] In Venezuela and Ecuador, the new constitutions strengthened the presidents' power considerably, giving incumbent executives power to legislate around existing institutions.[91] And in

[86] *See* LEVITSKY & WAY, *supra* note 25, at 78-81 (arguing that "there is reason to be skeptical about the impact of the institutional design in competitive authoritarian regimes").

[87] *Id.* at 79.

[88] *See* William Case, *Manipulative Skills: How Do Rulers Control the Electoral Arena?*, *in* ELECTORAL AUTHORITARIANISM, *supra* note 25, at 95, 99-104 (listing techniques for controlling elections that generally fall short of election-day fraud).

[89] For other examples of the use of constitutionalism in the construction of weakly democratic regimes, see, for example, Landau, *Constitution-Making*, *supra* note 1, at 938-39 (examining this phenomenon in Bolivia, Venezuela, and perhaps now Egypt); William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193, 209-33 (2012) (discussing Russia, Belarus, Ukraine, and other post-Soviet countries).

[90] *See supra* text accompanying note 36.

[91] *See supra* notes 59, 67 (noting the increase in executive power in both Venezuela and Ecuador).

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Hungary, the new constitutional order weakened or disabled some of the checking institutions, giving the Fidesz more power.[92]

Moreover, constitutional change can be used to either dismantle or pack institutions serving as strongholds for the opposition. The weakening or removal of opposition figures is instrumental to the construction of competitive authoritarian regimes because it gives incumbents a greatly increased power to rework the state to their advantage. The examples described above show that constitutional replacement can be a particularly efficient way for political actors to entrench themselves in power and to overcome political opposition, and thus is likely more dangerous than constitutional amendment. First and foremost, constitutional replacement gives dominant actors a chance to sweep away the power bases of opposition groups. Chavez in Venezuela, Correa in Ecuador, and the Fidesz in Hungary all gained control over a core branch or branches of government by winning elections, but they did not have initial control over the entire state. Key institutions, such as legislatures (in the presidential system), courts, ombudsmen, electoral tribunals, and state and local officials (in federal Venezuela) remained outside of their grasp.

Rewriting the constitution gave these would-be authoritarian actors a chance to weaken or remove some of these institutions and to pack others. By shifting from one constitutional order to another, rulers could argue that existing office-holders in these institutions no longer held a valid grip on power and could legitimately be replaced, a technique that Chavez and his Constituent Assembly used extensively in Venezuela.[93] They could also change the size of existing institutions, as the Fidesz did with the Constitutional Court in Hungary.[94] Or they could close down existing institutions entirely and create new ones with weaker powers. The trick, as well, is that packing or dismantling a single institution will rarely have serious consequences for democracy, but sweeping away large parts of the institutional order — as was done in all of these cases — may allow rulers to entrench themselves in power for long periods of time.

In short, constitutional change needs to be viewed as a core part of modern authoritarian projects. Powerful individuals or groups can abuse constitution-making to create constitutional orders in which they face few constraints on their power and in which they will be difficult or impossible to dislodge. This new construction of formal

[92] *See supra* text accompanying notes 71–82.

[93] *See supra* text accompanying notes 56–57.

[94] *See supra* note 76.

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rules works in tandem with informal norms such as bribery and harassment within competitive authoritarian regimes.

One could respond by saying that abusive constitutionalism is simply an act of normal constitutionalism, and thus not a real cause for concern. Constitutional orders should be open to change for various reasons, including technological and social change, or simply deep-rooted shifts in the values and interests of a population.[95] Yet there are several reasons why the kinds of changes involved here are particularly dangerous. First, they appear to weaken the degree to which a regime is democratic over long periods of time. Constitutional change of this type weakens institutions and allows the construction of an uneven playing field, whereby incumbents enjoy large electoral advantages over their opponents. It seems likely that these effects persist even after the original incumbent at issue has been ousted.[96]

Second, the identification of abusive constitutional change with any kind of enduring popular will is problematic. Incumbents capitalize on transient surges in their popularity to push through changes that impact the democratic order. They also manipulate electoral law and other mechanisms to inflate their support. In Hungary, for example, the Fidesz won only fifty-three percent of the vote, but sixty-eight percent of the seats because of a set of electoral rules that were designed to encourage majoritarian governance by rewarding winning parties with additional seats.[97] The party's approval rating has since dropped sharply, although it would still win hypothetical pluralities against other parties.[98] This did not represent a durable mandate for

[95] *See, e.g.*, Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* COMPARATIVE CONSTITUTIONAL LAW 96, 97-102 (Tom Ginsburg & Rosalind Dixon eds., 2011) (explaining the various purposes behind constitutional amendment rules).

[96] As an example, one might consider Russia, where then-President Boris Yeltsin was able to take the constitution-making process out of the elected Parliament and into a handpicked special Assembly after winning a popular referendum. *See* Partlett, *supra* note 89, at 210-26 (explaining the Russian constitution-making process and how it went wrong); *see also* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 136-37 (2001) (explaining how the Russian constitutional court was nullified as part of the Russian constitution-making process). The constitutional order Yeltsin constructed, which contained both a very strong president and weak checking institutions, has continued to leave its imprint on Russian politics, long after Yeltsin left the scene. Russia continues to be a competitive authoritarian regime under Putin. *See* Valerie J. Bunce & Sharon L. Wolchik, *Defeating Dictators: Electoral Change and Stability in Competitive Authoritarian Regimes*, 62 WORLD POL. 43, 44 (2010) (noting that Russia remains a competitive authoritarian regime).

[97] *See* Miklós Bánkuti et al., *supra* note 69, at 138-39.

[98] *See Hungary Government Party Support Lowest in Over a Decade — Poll*, REUTERS

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the kind of change that the Fidesz was subsequently able to carry out. Similarly, in Venezuela, Chavez won an election with only fifty-six percent of the national vote. His candidates then won sixty percent of votes in an election for a Constituent Assembly that was largely boycotted by the opposition, but this translated into over ninety percent of seats due to electoral rules handcrafted by Chavez himself.[99] The Constituent Assembly process, in which a single electoral group steamrolled the insignificant opposition, was not representative of any strong social consensus in favor of Chavez's formula. Like the Fidesz, he effectively capitalized on a momentary surge in popularity to alter the shape of the democracy over the long haul.

The argument against abusive constitutionalism does not depend on the particular policies pursued by these actors, but merely on the fact that they are making their regimes significantly less democratic. Chavez and Correa are leftist populists, Uribe is a right-leaning neoliberal, and the Fidesz party is a right-wing nationalist movement. There may be merit in some of the policies followed by these actors, and not in others.[100] Regardless of policy orientation, the deterioration of both the public's ability to vote these incumbents out and the weakening of horizontal checks that are supposed to hold them accountable is a substantial cause for concern. The absence of both vertical and horizontal checks appears to be related to a long list of negative outcomes: deterioration in the quality of policy, less responsiveness of politicians to the will of the public, and a higher incidence of human rights abuses.[101]

If I am correct both that the creation of hybrid forms of authoritarianism through mechanisms of constitutional change is increasingly common and that these kinds of authoritarian regimes represent a threat about which we ought to be concerned, then the remaining key question is how to stop it. This is, of course, the million dollar question, and I spend the rest of this article tackling it. Parts II and III survey mechanisms of democratic defense in both comparative constitutional law and international law. My core conclusion is

(June 7, 2012), http://www.reuters.com/article/2012/06/07/oukwd-uk-hungary-parties-idAFBRE8560F420120607.

[99] *See* Segura & Bejarano, *supra* note 55, at 225 (describing how Chavez managed to manipulate the constitution-making process in Venezuela).

[100] *See, e.g.*, GREGORY WILPERT, CHANGING VENEZUELA BY TAKING POWER: THE HISTORY AND POLICIES OF THE CHÁVEZ GOVERNMENT (2007) (defending the thrust of Chavez's political policies).

[101] *See, e.g.*, Diamond, *supra* note 25, at 25-26 (observing the relationship between regimes that are not particularly competitive electorally and illiberalism, where regimes do not observe basic human rights).

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unsettling — the existing tools at both levels are not very effective at controlling this threat. Moreover, the flexible nature of abusive constitutionalism (for example, the fact that there are often multiple ways for would-be authoritarians to achieve the same goal) makes it a difficult threat to combat.

## II. A CRITICAL REVIEW OF RESPONSES IN COMPARATIVE CONSTITUTIONAL LAW

In this Part, I survey key aspects of comparative constitutional design and scholarship that are supposed to make democratic constitutionalism resistant to erosion from within.[102] My main conclusion is that these tools are largely ineffective against the threat posed by abusive constitutionalism. The next Part conducts a similar analysis of solutions and potential solutions at the international level.

The post–World War II generation of constitutional scholarship developed the German conception of militant democracy, which holds that states may actively root out threats posed by illiberal or undemocratic groups attempting to use the forms of democracy to achieve their goals. The paradigm case, of course, was the Nazi's overthrow of the democratic Weimar Republic from within. The most important manifestation of militant democracy is in modern party-banning clauses, which generally allow constitutional courts to prohibit political parties with aims that run counter to the fundamental values of the democratic state. As I show below in section II(A), this kind of clause is of very limited value against the threat of abusive constitutionalism. The movements and parties that bear the fruit of abusive constitutionalism are generally too big, and their platforms too ambiguous, to be reasonably banned from the political sphere. Militant democracy is more effectively deployed against ideologically-charged threats to democracy, which are not as common today as they were during the beginning and middle of the twentieth century.

More recent work has focused on controlling the mechanisms of constitutional amendment and change in order to fortify them against abusive constitutional maneuvering. The state-of-the-art here is a conception of constitutional change that one might call "selective

[102] I bracket here the rich literature on how different forms of government structure might affect a polity's likelihood of downfall. *See, e.g.*, Juan L. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, *in* THE FAILURE OF PRESIDENTIAL DEMOCRACY 3 (Juan L. Linz & Arturo Valenzuela eds., 1994) (concluding that presidential systems are more likely to be overthrown than parliamentary systems, and theorizing reasons for this difference).

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rigidity." In a selectively rigid order, the basic amendment threshold is set fairly low, allowing updating of constitutional texts. But core parts of the democratic order can be protected by two different methods: tiered amendment thresholds and the doctrine of unconstitutional-constitutional amendments. The first method uses textual provisions to especially entrench certain vulnerable provisions by requiring higher supermajorities or other mechanisms. The second allows courts to strike down certain constitutional amendments that threaten the democratic order as substantively unconstitutional. Both mechanisms have become well-known within comparative constitutional law as ways to defend the democratic order against threats from within.

In sections II(B) through II(D), I show that these tools, as well, are only of limited use in protecting against abusive constitutionalism. At least as currently practiced, both have significant weaknesses, which can be exploited by would-be authoritarian actors. Tiered constitutional amendment thresholds are often used to protect expressive values like the right to human dignity, rather than the kinds of provisions — like tenure protections for constitutional courts — that abusive constitutional practices tend to target. And given the fungibility of abusive constitutional practices — there are often many ways to achieve the same goals — it would be difficult to design an effective textual regime.

The unconstitutional-constitutional amendments doctrine is intended to fill these gaps by giving courts a more flexible tool to respond to abusive constitutional practices. But both theory and experience suggests a real risk that courts cannot be depended upon to apply the doctrine in warranted cases, but rather will be both over- and under-inclusive. Moreover, the theoretical justification for tight control over constitutional amendments suggests a distinction between constitutional amendment and constitutional replacement that does not hold up in practice. Both are susceptible to abusive constitutional practice, as the Hungarian and Venezuelan cases show in Part I. Thus, the unconstitutional-constitutional amendments doctrine is likely to prove effective only if paired with restrictions on constitutional replacement. Such restrictions rarely exist. In short, we are a long way from developing a coherent system to control constitutional change, and it may not be feasible to construct such a system.

### *A. Militant Democracy and Party Banning*

In comparative constitutional law, the German concept of militant democracy has been the major defense mechanism for democratic

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orders. It was invented in Germany following the end of World War II, and the obvious impetus was the way that the inter-war Weimar Republic was undermined and then overthrown by the anti-democratic Nazi party during the 1920s and 1930s.[103] Militant democracy is a rich concept with many elements, centered on a refusal to allow anti-democratic elements to use the freedoms and tools of democracy in order to destroy the democratic order.[104]

However, most recent scholarship has focused on party-banning, or the ability of a constitutional court to dissolve parties that are considered essentially anti-democratic. The German Basic Law, for example, gives its Constitutional Court the power to ban parties that "by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."[105] This provision was used to ban Neo-Nazi and Communist parties in the 1950s,[106] and

[103] The Nazi experience also impelled structural innovations in the design of parliamentary politics, such as the constructive vote of no confidence, which requires that actors seeking to bring down a democratic regime must first suggest an alternative government. *See* Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1860 (2010) (discussing the possibilities for adopting the constructive vote of no confidence in the United States as a way to allow Congress to limit presidential power).

[104] The party-banning clause emphasized here does not exhaust the reach of the model, but it is its most canonical element. The model, for example, also allows for restrictions on fundamental rights and the freedom of association for individuals and groups that take action against the democratic order. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) arts. 9, 11, 18. The German Constitutional Court has referred to the concept in contexts that are very far afield from party-banning, for example in the data mining context. Thus, the term has been given recent relevance as part of a package of anti-terrorism measures. *See, e.g.*, Russell A. Miller, *Balancing Security and Liberty in Germany*, 4 J. NAT'L SEC. L. & POL'Y 369, 371-75 (2010) (looking at constitutional provisions allowing limitations on association and freedom of movement in light of post-9/11 security concerns); András Sajó, *From Militant Democracy to the Preventive State?*, 27 CARDOZO L. REV. 2255, 2255-56 (2006) (theorizing a broad set of responses of a militant democracy to terrorist threats); Paul M. Schwartz, *Regulating Govermental Data Mining in the United States and Germany: Constitutional Courts, the State, and New Technology*, 53 WM. & MARY L. REV. 351, 380-81 (2011) (considering German jurisprudence on data screening practices in light of militant democracy principles).

[105] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) art. 21.

[106] *See* Communist Party Case, 5 BVerfGE 85 (1956); Socialist Reich Party Case, 2 BVerfGE 1 (1952), *in* THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 286, 286-89 (Donald P. Kommers & Russell A. Miller eds., 3d ed. 2012). *See generally* Judith Wise, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 U. CHI. L. SCH. ROUNDTABLE 301, 302-03 (1998) (discussing the latter decision).

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these provisions have been utilized in either the same or modified form in a number of countries like India, Israel, and Turkey.[107] Samuel Issacharoff has recently put these provisions at the center of his scheme for the defense of "fragile democracies," arguing that they may be abused in some cases, but if used properly, can prevent regimes from being taken over by anti-democratic forces.[108] Similarly, Gregory Fox and Georg Nolte argue that party-banning of anti-democratic movements was clearly allowed by international law under certain circumstances, and likewise argued for its practical importance in preventing anti-democratic forces from taking over the state.[109]

The argument of this section is that these provisions may be useful against traditional authoritarian or totalitarian threats carried by ideologically anti-democratic parties such as the Nazis, but are much less useful against the modern threats posed by abusive constitutionalism. The reasons are two-fold: First, unlike movements such as the Nazis, parties and actors that lead abusive constitutional movements have ambiguous platforms that are not clearly anti-democratic in nature. In other words, the party-banning concept assumes that one can determine which parties are essentially anti-democratic. This worked reasonably well with movements that espoused fundamental alternatives to democracy, such as Communism or National Socialism. But these sorts of movements are now rare; virtually all parties and movements now espouse at least a rhetorical commitment to democracy in some form. None of the movements examined in Part I were led by actors who rejected democracy.[110] Similarly, large Islamic movements such as the Egyptian Muslim Brotherhood are mainly a threat to democracy not because of their ideology, but because they possess disproportionate power in a weak political environment.[111] Like the abusive constitutionalist projects studied in Part I, the threat is not that they will overthrow democracy, but rather that they will bend it to their own concerns. The abusive constitutionalism project is not fueled by an alternative ideology, but instead by situational factors — the ability to dominate the political

[107] *See, e.g.*, Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST. L. 488, 493-94 (2006) (surveying constitutional provisions allowing for party banning).

[108] *See* Issacharoff, *Democracies*, *supra* note 6, at 1466-67.

[109] *See* Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 2 (1995).

[110] *See supra* Part I.B–D.

[111] *Cf.* Jamie O'Connell, *Common Interests, Closer Allies: How Democracy in Arab States Can Benefit the West*, 48 STAN. J. INT'L L. 341, 389 (2012) (stating that the Muslim Brotherhood has adopted "notably democratic internal procedures").

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space in a country, and to use that space to entrench themselves in power for long periods of time. But this poses a serious problem for any efforts to ban such parties, because it means that they are difficult to identify by standard tools, such as party platforms, and that any effort to ban them is likely to prove grossly over-inclusive.

Second, unlike most anti-democratic parties, which are fringe movements that are initially quite small, abusive constitutional movements tend to be carried by large majoritarian movements with substantial popular support.[112] This means that attempts to ban such parties may themselves be destabilizing to the democratic order. Banning fringe parties may not matter much, since the small number of adherents may simply shift to more mainstream options. But a court that bans majoritarian and centrist movements is likely to be playing some variant of what has been called the "impossible game" — the large number of supporters will not accept an electoral regime without their player in it, and their protests will eventually force the regime to either become more repressive or to let the banned party back in.[113] Either way, the effort will fail in its core purpose.

The Turkish experience with party-banning, which is the richest and most interesting among modern countries, offers instructive examples of both problems: the problem of identifying a competitive authoritarian movement as anti-democratic, and the problem of trying to ban majoritarian movements.[114] In a series of important cases beginning in 1998, the Turkish Supreme Court banned significant political movements with widespread support. The rationale for these cases was that the movements at issue were Islamic in orientation, and thus contrary to the secular substantive values of the Turkish state. Yet unlike the Neo-Nazi and Socialist Party cases in Germany, the parties at issue in the Turkish cases were not fringe or extreme movements. They received substantial numbers of votes. The Welfare Party, for

[112] Consider the movements led by Chavez in Part I.C or the Fidesz in Part I.D — neither was ideologically extreme and both received substantial popular support.

[113] *See* RUTH BERINS COLLIER & DAVID COLLIER, SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA 487-88 (1991) (referring to the "impossible game" as the problem of the Argentine Peronist Party being unable to win elections because of its repugnance to elites despite previously being the majority party).

[114] The discussion here does not exhaust the Turkish experience with party-banning. In another series of decisions, for example, the country banned separatist parties associated with the Kurds. *See* Ödül Celep, *The Political Causes of Party Closures in Turkey*, PARLIAMENTARY AFFAIRS 1, 13-16 (2012) (collecting and discussing decisions). These decisions raise questions of constitutional theory that are important but distinct — many of those who would defend bans on anti-democratic parties see bans of minority separatist parties as inherently more problematic.

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example, won twenty-one percent of the vote and about one-third of the seats in 1995, and joined a majority coalition with a center-right secularist party, the True Path Party.[115] The Welfare Party's then-leader, Necmettin Erbakan, became prime minister.[116] After the military, trade unions, and business associations formed a common front against the Islamist party, the military declared Islamic parties to be anathema to core state values in 1997, and forced the party to resign from the ruling coalition.[117] It was banned by the Constitutional Court in 1998, and this decision was upheld by the European Court of Human Rights.[118]

The European Court's decision upholding the ban is a troubling use of the militant democracy conception. It began by offering a ringing endorsement of militant democracy in the German mold: "[T]he Court considers that it is not at all improbable that totalitarian movements, organized in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history."[119] Further, the Court held that "a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent."[120]

The decision becomes problematic in actually applying the militant democracy principles to the Welfare Party.[121] The Court emphasized

[115] *See* Saban Taniyici, *Transformation of Political Islam in Turkey: Islamist Welfare Party's Pro-EU Turn*, 9 PARTY POL. 463, 471-72 (2003).

[116] *See id.* at 466, 472.

[117] *See* Mehran Kamrava, *Pseudo-Democratic Politics and Populist Possibilities: The Rise and Demise of Turkey's Refah Party*, 25 BRIT. J. MIDDLE E. STUD. 275, 275 (1998) (referring to this incident as a "soft coup").

[118] *See* Refah Partisi (The Welfare Party) v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98, 41344/98, § 133-36, ECHR 2003. This was in fact a grand chamber decision upholding an earlier decision made by a panel. *See generally* Refah Partisi (The Welfare Party) v. Turkey, nos. 41340/98, 41342/98, 41343/98, 41344/98, ECHR 2001 (laying out the prior panel decision).

[119] *Refah Partisi*, ECHR 2003, § 99.

[120] *Id.* § 102.

[121] A substantial literature examines the decision from a religious perspective, debating whether the Court overreacted to the threat of Islamic parties in Europe and thus allowed undue infringement on religious liberty. *See, e.g.*, Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663, 699 (2011) (arguing that "[t]he Court's analysis misconstrues the true nature of the conflict in Turkey, which, quite apart from questions of liberal rights and freedoms, centers on the locus of Islam as a source of political legitimacy among

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that the party already had substantial support and had joined a majority coalition, and was likely poised to win large majorities in the near future. To the Court, this strengthened the case for a ban because it showed that the party might be able to actually implement its program; the Court did not, however, discuss the difficulties involved in banning an already very popular party.[122] The Court then discussed in detail the party's program, finding that its religious orientation and especially its adherence to variants of sharia law rendered it anti-democratic. The Court noted that members of the party had made statements suggesting alteration of the legal system to recognize religious-based law to govern status and certain other private law questions and had praised sharia law.[123] At root, the Court thought that the platform was religious in a way that was incompatible with democracy: "The Court concurs in the . . . view that sharia is incompatible with the fundamental principles of democracy."[124]

The decision thus lays bare both the line-drawing and size problems. First, it is unclear whether the Welfare Party's platform really was anti-democratic. The allowance of separate religious status courts in certain areas is used in many democracies, including Israel,[125] and the modern Middle East is working towards finding a role for sharia law within democratic orders.[126] While the Court did find that some members of the party had suggested, in ambiguous

different elite groups in the historical context of Kemalism as a state-building project"); Claudia E. Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991, 1009-10 (2012) (arguing that the decision heralded a nonestablishment model in the Court's jurisprudence).

[122] *See Refah Partisi*, ECHR 2003, § 107-10.

[123] *See id.* § 120-25. For example, the party's leader, Necmettin Erbakan, had made statements to the following effect: "We shall guarantee to everyone the right to live as he sees fit and to choose the legal system he prefers . . . . When we are in power a Muslim will be able to get married before the mufti, if he wishes, and a Christian will be able to marry in church, if he prefers." *Id.* § 28.

[124] *Id.* § 123.

[125] *See, e.g.*, GARY J. JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 72-88 (2003) (explaining the Israeli system of religious status courts); *see also* Daphne Barak-Erez, *Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change*, 30 CARDOZO L. REV. 2495, 2497 (2009). This model of course creates tensions with democratic values, but that does not necessarily make it incompatible with democracy in all its incarnations.

[126] *See generally* RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010) (explaining ways in which courts are used to channel and control religious law in the Middle East); Kristen Stilt, "*Islam is the Solution": Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 TEX. INT'L L.J. 73 (2010) (noting considerable vagueness in the platform of the Muslim Brotherhood, and thus finding it difficult to figure out exactly how their platform meshes with democratic values).

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terms, the use of force or other extra-legal measures to gain power, it put little weight on this conclusion and had little support for it.[127] The party was identifiably religious; it was probably not identifiably anti-democratic. Further, the Court does little to explain why the banning of such a significant party, representing a broad swath of Turkish society, is likely to be effective.

Instead of disappearing, elements of the Welfare Party formed a successor party, called the Virtue Party. The Virtue Party continued to espouse an Islamist agenda and contained many of the same actors as had earlier held power in the Welfare Party. The party did well in the 1999 elections, winning fifteen percent of the vote and 111 of the 450 parliamentary seats.[128] But it was again banned by the Constitutional Court, which held that, although it was identifiably different from the old Welfare Party, it too had a fundamentally Islamic platform.[129] Even after being banned a second time, the party did not disappear, but instead elements of it reformed as the Justice and Development Party, which has controlled Turkish politics with an absolute majority of the Parliament since the 2002 general elections.[130] The party controlled 363 of 550 seats in 2002, 341 of 550 seats in 2007, and 327 of 550 seats in 2011.[131]

Defenders of the party-banning paradigm, most notably Samuel Issacharoff, have argued that the Turkish case shows that it does work under modern scenarios, because the successive emanations of the party moderated somewhat from their previous incarnations.[132] This is true, but may miss the larger point: the core interests represented by the party survived and it took power within a fairly short period of time. Moreover, one of the biggest problems now faced in modern Turkish politics is the predominant role of the Justice and

[127] *See Refah Partisi*, ECHR 2003, § 130-31 (concluding, after canvassing relevant speeches, that "there was ambiguity in the terminology used to refer to the method to be employed to gain political power").

[128] *See* Birol A. Ye ilada, *The Virtue Party*, 3 TURKISH STUD. 62, 75 tbl.1 (2002).

[129] *See* Asli Ü. Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235, 281 n.156 (2012).

[130] *See* Ergun Özbudun, *From Political Islam to Conservative Democracy: The Case of the Justice and Development Party in Turkey*, 11 S. EUR. SOC'Y & POL. 543, 545-46 (2006).

[131] *See* Meltem Müftüler-Baç & E. Fuat Keyman, *Turkey Under the AKP: The Era of Dominant-Party Politics*, J. DEMOCRACY, Jan. 2012, at 87.

[132] *See, e.g.*, Issacharoff, *Democracies*, *supra* note 6, at 1446-47 (arguing that "[u]nder the circumstances, it is difficult to imagine a better outcome"); Özbudun, *supra* note 130, at 548 (finding that the movement moderated through its successive emanations and its platform is now "hardly distinguishable from a liberal or conservative democratic party").

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Development Party.[133] This occurred not because of the ideology of the party as much as because of its size relative to its competitors. The party has at times resorted to questionable methods in order to achieve its goals, for example, using legal proceedings to harass the opposition.[134] It has also utilized its largely-unilateral control over constitutional reforms in a way that may have weakened the democratic nature of the state; for example, by radically altering the composition and powers of the Constitutional Court.[135]

The Turkish experience demonstrates the limits of party-banning in dealing with situations where the main threat is the construction of a competitive authoritarian regime via the means of abusive constitutionalism. The strategy is unlikely to work well when dealing with ideologically ambiguous political forces, rather than those that are clearly anti-democratic. It is also unlikely to work well when dealing with majoritarian rather than fringe political forces. These are precisely the characteristics under which abusive constitutionalism tends to occur, and under which competitive authoritarian regimes form. Thus, party-banning and militant democracy have probably been overstated as solutions to modern authoritarian threats.

### *B. Tiered Constitutional Amendment Thresholds*

The remainder of this Part focuses on the design of the mechanisms of constitutional change. Most countries have migrated towards a baseline level of constitutional amendment that is relatively easy, certainly far easier than in the United States. Indeed, the United States amendment procedure under Article V is considered among the most difficult in the world, requiring a two-thirds vote in both houses of Congress as well as ratification by three-quarters of the state legislatures.[136] A developing literature suggests that a relatively low

[133] *See* Ali Çarko lu, *A New Electoral Victory for the 'Pro-Islamists' or the 'New Centre-Right'? The Justice and Development Party Phenomenon in the July 2007 Parliamentary Elections in Turkey*, 12 S. EUR. SOC'Y & POL. 501, 516-17 (2007) (raising the possibility that Turkey "is moving towards a dominant party system similar to India, Japan or Italy before the 1990s").

[134] *See, e.g.*, Sebnem Arsu, *Arrest of Prosecutor in Turkey Exposes Tensions Between Secular and Religious Turks*, N.Y. TIMES (Feb. 20, 2010), http://www.nytimes.com/ 2010/ 02/21/world/europe/21turkey.html?_r=0 (detailing questionable arrests).

[135] Turkish scholars debate whether the reforms to the Constitutional Court and other tribunals packed it or simply constituted a liberalization and democratization of the judiciary. *See, e.g.*, Bâli, *supra* note 129, at 295-309 (summarizing the debate and arguing that the reforms liberalized the Court's composition and took away authoritarian elements in its design).

[136] *See* Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV.

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(although not too low) amendment threshold has desirable effects.[137] Empirical evidence finds that constitutions with an intermediate difficulty of amendment tend to last longer than those with either very easy or very difficult amendment thresholds.[138] The hypothesis is that extremely easy amendment mechanisms are associated with constitutions that are considered meaningless by their own populations, while very rigid constitutions are replaced because they fail to adapt to the times.[139] Based on this evidence, the U.S. Constitution appears to have survived despite, rather than because of, its very rigid amendment mechanisms. The U.S. Constitution has been extensively amended through extra-constitutional means,[140] but scholars have uncovered relatively little evidence that these practices translate into other contexts.[141] It may be that the United States has

1435, 1438 (2011) (noting how difficult and time-consuming the U.S. amendment process is); *see also* DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 tbl.5.7 (2006) (constructing an index showing that the United States has the second most difficult amendment process out of a list of countries); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 184 (1998) (arguing that the Article V process is so difficult to use as to make change practically impossible).

[137] *But see* John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1954-56 (2003) (noting that Article V "has become the constitutional provision commentators love to hate" and defending the provision as helping to maintain the core substantive commitments of the constitutional order).

[138] *See* LUTZ, *supra* note 136, at 162 tbl.5.2; *see also* TOM GINSBURG ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 140 fig.6.4 (2009) (showing a U-shaped relationship, and arguing that the ideal level of difficulty from the standpoint of endurance is roughly the Indian amendment process, which requires a two-thirds majority of Congress for most topics and, in addition, the approval of one-half of the states for certain topics).

[139] *See* LUTZ, *supra* note 136, at 156.

[140] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7 (1991) (arguing that major constitutional change in the United States has taken place in extra-constitutional ways rather than through the amendment process, as the Constitution is remade in certain "constitutional moments" by combinations of the public, political actors, and the courts); *see also* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (arguing that Article V procedures were not intended to be the exclusive avenue of constitutional reform, and presuppose a "background legal right of the people" to "alter or abolish Government via the proper legal procedures"). *But see* Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 121-22 (1996) (rejecting Amar's argument based on an analysis of the intent of the framers).

[141] *See, e.g.*, Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INT'L J. CONST. L. 193, 228-30 (2008) (arguing that the Quebec secession case represented a case of extra-constitutional amendment by the Canadian Supreme Court, and calling on scholars to identify other such cases).

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found a relatively unusual way of updating its Constitution that cannot easily be replicated elsewhere. Most evidence, at any rate, points towards making overall constitutional amendment relatively easy compared to the United States.

Yet this design faces an obvious problem in that it would allow a constitutional order to be distorted from within very easily — the lower the amendment threshold, the more vulnerable a system would be to abusive constitutional amendments. The stock solution in modern constitutional theory is to use tiered amendment thresholds. The concept is simply to protect some parts of the constitutional text with heightened amendment requirements, making them more difficult to alter.[142] The most basic form of tiering uses heightened supermajority requirements. For example, most parts of the South African Constitution may be amended by a two-thirds vote of the Parliament, but a set of foundational principles found in section I (as well as the principles governing amendment itself) are more difficult to change, and require the assent of seventy-five percent of Parliament.[143] In extreme cases, some provisions might be made completely unamendable, as the Honduran Constitution has done with respect to presidential re-election, and as the German Constitution does with respect to certain core principles.[144]

Despite the growing importance of tiered constitutionalism, there is still little scholarly work on both how to carry it out and what sorts of provisions ought to be protected. Considering the practice through the lens of abusive constitutionalism has implications for both points. First, on the "how" question, some theorists suggest that including a popular component to constitutional change (for example, by requiring the public to ratify the results of whatever amendment has

[142] *See* Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 709-10 (2010) [hereinafter *Handcuffs*] (advocating for such a system to protect certain important provisions).

[143] *See* S. AFR. CONST., 1996, art. 74. The regime is a bit more complex — Chapter 2 of the Constitution requires approval of two-thirds of the Parliament plus the assent of the National Council of Provinces, with the agreement of at least six provinces. *See id.* Any other provision may be amended with the assent of two-thirds of Parliament, or a vote of the National Council of Provinces if the provision concerns their interests. *See id.*

[144] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) art. 79, § 3 ("Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."); CONSTITUTION OF THE REPUBLIC OF HONDURAS [CH] art. 374 (making certain constitutional provisions completely unamendable).

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passed the legislature) may increase the difficulty of amendment.[145] Empirical studies offer mixed results on the question of whether or not such requirements actually reduce the frequency of constitutional amendment.[146] But regardless of whether or not such requirements decrease the frequency of amendment in the abstract, they seem unlikely to do much to curb abusive constitutional practices. Powerful political actors who are able to push their reforms through legislatures seem likely to have the ability to gain the requisite degree of direct popular support in most cases. Indeed, as the Chavez and Correa examples show, powerful leaders often use the public as a way to make an end-run around institutions when they cannot get what they want out of these institutions.[147] Adding tiers to the constitution by adding referenda requirements or other forms of popular participation seems unlikely to be productive.

In practice, the more common approach of adding higher supermajority requirements for certain changes seems more likely to be effective. But even relatively high supermajority requirements may not adequately protect democracy against abusive constitutional practices. The Hungarian example, in particular, shows that it may not be that difficult for movements to temporarily receive very high percentages of the vote.[148]

This suggests the utility of a third, still under-theorized and under-utilized aspect to constructing constitutional tiers: a temporal dimension.[149] Time appears to be a particularly relevant dimension to combating the problem of abusive constitutionalism, because it can combat the ability of temporarily powerful political forces to entrench themselves in power for the long haul. Yet few constitutional orders utilize time effectively as a break on constitutional change. Some systems do require multiple votes on a constitutional issue, but often

[145] *See, e.g.*, LUTZ, *supra* note 136, at 168 tbl.5.6 (constructing an index of difficulty that adds significant points for constitutional amendment processes requiring popular referenda).

[146] *See, e.g.*, John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 LAW & SOC. INQUIRY 501, 523 (1997) (finding that popular involvement via ratification adds little difficulty to amendment processes).

[147] *See supra* Part I.C.

[148] *See supra* Part I.D.

[149] *See* Albert, *Handcuffs*, *supra* note 142, at 711 (noting and recommending a regime of "sequential approval," where citizens have to manifest their will to alter the constitution in more than one vote, and that vote is separated by an interval of time); Vermeule, *supra* note 136, at 1438 (noting one potential benefit of Article V amendment procedures, which is that their slowness may induce "sober second thoughts").

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with no restriction or only a minimal restriction on interval.[150] A far better model, which is rarely found in practice, would require an intervening election between efforts at constitutional change, preferably of both the legislature and (in presidential systems) of the executive.[151] The intervening election requirement is helpful because it reduces the possibility that incumbent politicians and parties can take advantage of temporary spikes in their popularity to push through amendments that are harmful to democracy. Thus, the ideal tiered regime would seem to include temporal restrictions that require multiple votes on amendments, with a long period of time (and ideally an intervening election) between the votes. These temporal limitations are probably the most important variable in terms of combatting abusive constitutional practices, although they might be used along with the far more common practice of increasing the voting threshold.[152]

The more difficult problem is in determining which kinds of provisions deserve to be placed on the higher amendment tier or tiers. Here there has been virtually no theoretical work, and indeed scholars seem to assume that the answers are highly specific to the individual political culture at issue. We might call this an "expressivist" theory of constitutional tiering, in which a state protects its most fundamental values by giving them a special degree of entrenchment. A classic example is Germany, where the Basic Law makes its most basic

[150] As an example, the Colombian Constitution requires two separate votes on a constitutional amendment, and requires that those votes be taken during separate legislative sessions. The first vote requires a simple majority of Congress, while the second requires an absolute majority. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 375. Although this model technically requires two separate votes, these votes need be separated by very little time — Congress can, and often does, take the first vote towards the end of one legislative session, and take the other only a few days or weeks later at the beginning of the next. Moreover, since each legislative session is only one year, the requirement does not normally interpose a legislative or presidential election. *See generally* James Melton, Constitutional Amendment Procedures: A Summary and Critique of Existing Measures (June 18, 2012) (unpublished working paper) (on file with author), *available at* http://www.ucl.ac.uk/~uctqjm0/Files/melton_amendment.pdf (commenting on the problems with measuring temporal limitations in the literature).

[151] This model is used, for example, in Greece, which requires that amendments be voted on by two different Parliaments via two different voting thresholds — fifty percent in one vote and sixty percent in the other. *See* 1975 SYNTAGMA [SYN.] [CONSTITUTION] 110 (Greece).

[152] Empirically, there is no research on this question. Researchers have extensively considered the relationship between different kinds of amendment regimes and the amendment rate, but have had trouble measuring temporal limitations. *See* Melton, *supra* note 150, at 28 (noting that temporal limitations are "trivialized by existing measures of amendment difficulty").

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principles, particularly "human dignity," unamendable by any means.[153] South Africa takes a very similar tactic: it places basic values such as "human dignity," "non-racialism and non-sexism," and "universal adult suffrage" on the highest tier, which requires a three-quarters rather than two-thirds majority of Parliament for amendment.[154]

This approach to allocating tiers may play some role in helping to define the basic values of the state by holding these values out for special protection. But it is badly antiquated as a strategy for defending democracy. It appears aimed at the same kind of totalitarian or fundamentally anti-democratic threat as the party-banning clauses and the militant democracy concept studied in section II(A).[155] Modern "competitive authoritarian" movements do not generally seek to destroy the basic values of the constitutional order nor seek some radically different vision for the shape of the state.[156] They would not be interested in altering fundamental constitutional principles such as "human dignity," so long as they could carry out enough institutional alterations to perpetuate their own power.

Thus, an analysis of abusive constitutional practices suggests that these are not the most important constitutional clauses to be entrenching on a higher tier. We need more empirical research on exactly how competitive authoritarian regimes work within constitutional orders in order to have a fuller response to the question. However, the expressivist approach to entrenchment seems aimed at precisely the wrong things: competitive authoritarian regimes take power by attacking the constitutional structure in subtle ways, rather than by taking aim at either basic constitutional principles or rights.

Protecting the constitutional structure against abusive constitutional practices is quite difficult. The most obvious and common provisions are those entrenching term limits, which proved to be the flashpoint of contention in the Honduran case.[157] As the Hungarian case in

[153] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) art. 79, § 3 (protecting the division of the state into Länder and certain basic principles such as human dignity from ever being amended).

[154] *See* S. AFR. CONST., 1996, art. 74.

[155] *See supra* Part II.A (considering the post-war German model of militant democracy, which aims to eliminate anti-democratic threats from the democratic order).

[156] *See supra* Part I.E (noting that competitive authoritarian regimes gain power not by proposing a radically different vision for the state, but by disabling opposition parties and packing or disabling checking institutions).

[157] *See supra* Part III.A (noting the entrenchment of presidential term limits in

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particular shows, abusive constitutional actors also may attack a range of other provisions that bear on the central structural characteristics of those checking institutions which are supposed to rein in the political branches. Provisions bearing on the size, composition, and tenure of high-ranking judges might be particularly valuable, and yet are generally unprotected in existing constitutions. Similarly, they might attack the tenure and selection mechanisms of other key mechanisms of horizontal accountability such as ombudsmen and attorneys general.

Crafting a set of tiered constitutional protections that would fully protect the constitutional structure is likely to prove impossible. No single provision is likely to prove decisive, since abusive constitutionalists have many ways to achieve the same goal. For example, an actor stymied in altering a key structural provision might get a similar result by packing or undermining the court, a result that could be achieved by altering the selection mechanism, reducing jurisdiction, or in a host of other ways. In the absence of overarching protection, would-be autocrats may be able to find alternative provisions at both the constitutional and statutory level to achieve identical ends, thus effectively working around tiered provisions.[158]

And, of course, the entire constitutional structure cannot be subjected to higher-tiered protection because such an approach would make the constitutional order entirely rigid, as opposed to just selectively rigid and aimed at abusive constitutional threats. It would block many innocuous changes as well as some dangerous ones. One of the problems with abusive constitutionalism is precisely that the same set of constitutional changes can be dangerous in one situation and innocuous or beneficial in others. The Hungarian constitutional changes, a kind of "Frankenstate" cobbled together from a set of common constitutional provisions and legal rules found in many well-functioning constitutional orders, are a case in point. The tiering mechanism is not discriminating enough to separate out the dangerous constitutional changes from the innocuous ones. The stock answer to the deficiencies of constitutional tiering is the unconstitutional-constitutional amendments doctrine, which is the focus of the next section.

Honduras).

[158] As an example, consider the Hungarian case in Part I.D — the Fidesz party utilized a variety of alternative means to undermine the Constitutional Court and the judiciary, including packing the court, stripping part of its jurisdiction, and lowering the retirement age for judges. Some of these changes required constitutional alteration or replacement, but others required mere statutory changes.

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### *C. The Unconstitutional-Constitutional Amendments Doctrine*

A series of countries have developed the so-called "unconstitutional-constitutional amendment doctrine," which holds that a constitutional amendment can itself be substantively unconstitutional under certain conditions. The doctrine has been espoused by courts such as the German, Indian, Turkish, and Colombian Constitutional Courts. In Colombia, as noted above, the Court recently used the doctrine to prevent President Alvaro Uribe Velez from amending the Constitution to run for a third consecutive term in office.[159] The Court held that the proposed amendment would constitute a "substitution of the constitution," rather than an amendment, because it fundamentally changed the separation of powers in the country.[160] The Turkish Constitutional Court struck down an amendment allowing Islamic headscarves to be worn in universities; the Court held that this amendment was contrary to the secular constitutional order.[161] Finally, in an example closer to home, the California Supreme Court discussed the doctrine in the context of Proposition 8, which banned gay marriage in the state.[162] The proponents argued that the amendment

[159] *See supra* Part I.B.

[160] *See supra* text accompanying notes 35–43.

[161] A woman denied the ability to wear a headscarf then took her case to the European Court of Human Rights, which ruled that her right to religious freedom had not been infringed. *See* Leyla ahin v. Turkey [GC], no. 44774/98, § 122-23, ECHR 2005; *see also* Cindy Skach, *International Decision*, 100 AM. J. INT'L L. 186, 195 (2006) (arguing that the case illustrates a complex interrelationship between domestic and international law on this issue). The case lies somewhere between the non-textual unconstitutional-constitutional amendments doctrine constructed by the Indian and Colombian Courts and the tiering practice noted above. The Turkish constitution does make some provisions unamendable, and this includes the provision prohibiting amendments to Article 2, which lays out the "basic characteristics" of the state and defines Turkey as being "a democratic, secular and social State." *See* Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment — The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision*, 10 INT'L J. CONST. L. 175, 194 (2012). But the court interpreted this doctrine to allow it to strike down constitutional amendments found elsewhere in the Constitution that infringe on the secular principle, which makes its usage very similar to the non-textual, common-law like usage of the Indian and Colombian Courts.

[162] *See* Strauss v. Horton, 46 Cal. 4th 364, 444 (2009) (finding that the Proposition does not constitute a constitutional revision because it does not undertake "far reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the Constitution"). *Strauss* is in fact part of a long line of California cases interpreting the amendment/revision distinction. *See, e.g.*, Prof'l Eng'rs in Cal. Gov't v. Kempton, 40 Cal. 4th 1016, 1046-47 (2007) (concluding that a constitutional change dealing with the contracting of architectural and engineering services is not a revision); Legislature v. EU, 54 Cal. 3d 492 (1991)

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constituted not an amendment, but rather a revision, which required a more stringent process under the California Constitution than mere majority approval by referendum.[163] The Court, after an extensive discussion of the history of the distinction and relevant doctrine, found that the change was an amendment and thus that the method used was proper.[164] The doctrine of unconstitutional-constitutional amendments has thus passed from the fringe of constitutional theory towards its center.

But the doctrine has also been subjected to an avalanche of scholarly criticism.[165] The crux of the critique is easy to make out: the doctrine seems to be "the most extreme of counter-majoritarian acts."[166] In other words, while ordinary judicial review overrides political action, the judicial decision might in turn be overridden by constitutional amendment.[167] In countries where constitutional amendment is

(holding that a proposition which adopted legislative term limits, limited spending on legislative staff, and restricted state retirement benefits was not a revision); Raven v. Deukmejian, 52 Cal. 3d 336, 349-55 (1990) (finding that a sweeping set of reforms to criminal procedure rules under the state constitution, intended to overturn numerous pro-defendant rulings of the California State Supreme Court, did indeed constitute a revision and thus was invalidated).

[163] An amendment may be proposed either by a two-thirds vote of the legislature, or by petition of eight percent of voters. In either case, the amendment is approved with the consent of a majority of voters. A revision is proposed by either a two-thirds vote of the legislature or a Constituent Assembly (which itself must be called by a two-thirds vote of the legislature followed by majority approval of the electorate). *See* CAL. CONST. art. II, § 8; *id.* art. XVIII, §§ 1–4.

[164] *See Strauss*, 46 Cal. 4th at 444.

[165] *See, e.g.*, Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JUR. 5, 22-23 (2009) [hereinafter *Amendments*] (calling the basic structure doctrine "curious," although suggesting some possible lines of defense); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 501 n.34 (1989) (stating that basic structure doctrine "remains a highly problematic and controversial element of Indian constitutional law"); Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1069-70 (2010) (declaring that Indian basic structure doctrine "lack[s] any basis in original understanding"); Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460, 487 (2006) (commenting that "if ever confronted with the felt need to exercise this option, sober heads might well wonder whether it was any longer worth doing"); Charles H. Koch, Jr., *Envisioning A Global Legal Culture*, 25 MICH. J. INT'L L. 1, 58 n.268 (2003) (referring to the basic structure doctrine as an "extreme example of judicial activism").

[166] Gary J. Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1799 (2004) (nonetheless suggesting possible justifications for the doctrine).

[167] *See* Miguel Schor, *The Strange Cases of* Marbury *and* Lochner *in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1477-80 (2009) (arguing that foreign countries adopted easier amendment thresholds and other mechanisms partly because of unrestrained fear of judicial power as expressed through *Lochner*).

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relatively easy (unlike in the United States), this is a real check on the power of judicial review. But the unconstitutional-constitutional amendments doctrine takes away this safety valve by allowing courts to strike down even constitutional amendments. Such an approach faces "obvious" problems from the standpoint of democratic theory.[168]

A focus on the practice of abusive constitutionalism suggests a justification for the doctrine, and an advantage over the use of constitutional tiers in the text. First, most constitutional orders are not well-crafted to deal with the modern dangers to democracy — they either fail to include tiered provisions at all or they tier the wrong kinds of things such as expressivist provisions, as the South African example shows.[169] Second, even an ideally-crafted constitution, with appropriate tiered provisions protecting key structural provisions, would not fully prevent the problem of abusive constitutionalism. Only certain limited parts of the constitution can be tiered; any alternative design would lose many of the benefits of constitutional flexibility. And would-be autocrats are experts in figuring out alternative ways to achieve the same ends. The Hungarian example illustrates the point with respect to the constitutional judiciary: rather than replacing the Constitutional Court or changing its tenure rules, the Fidesz simply added more positions to the Court, and therefore is moving towards "packing" it.[170]

As Issacharoff has pointed out, the doctrine of unconstitutional-constitutional amendments makes sense in such a world precisely because of its flexibility — it allows judges to defend the constitutional order without being constrained by the limits of constitutional text.[171] The core concerns of abusive constitutionalism are useful as a potential anchor, helping to make its usage more precise and justifiable. The claim is not that abusive constitutionalism necessarily offers the sole justification for the doctrine's use.[172] My

[168] Rosalind Dixon, Transnational Constitutionalism and Unconstitutional Constitutional Amendments (May 2011) (unpublished manuscript) (on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1840963.

[169] *See supra* text accompanying notes 153–154.

[170] *See supra* Part I.D.

[171] *See* Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011) [hereinafter *Courts*] (noting that the basic structure approach may be valuable because it may not be "apparent from the outset of a democracy which provisions may prove to be central," and that ex ante exposition of the provisions may be impossible).

[172] In contrast, uses in other areas often seem more problematic. For example, both the Turkish and Indian Courts have suggested that "secularism" may be a basic part of their respective constitutional orders. In Turkey, the Constitutional Court in 2005

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claim instead is more modest — it is particularly well-suited and well-justified by these practices. Thus, focusing on these practices helps to resolve an important conceptual problem: it clarifies the kinds of situations where the notoriously vague doctrine ought to be invoked.[173]

This perspective comports with that of other scholars who have suggested a "pragmatic" defense of the doctrine. Thus Issacharoff argues that the judicial construction of immutable principles in new democracies may help to prevent them from eroding from within by "protect[ing] the core features of contested democratic governance."[174] Similarly, Bernal tracks the use of the doctrine in the Colombian experience, and argues that it plays a valuable function in hyper-presidentalist regimes.[175] Using the Uribe case as an example, he notes that strong presidents can exercise disproportionate influence over these systems, co-opting amendment processes to serve their own

struck down a constitutional amendment allowing headscarves to be worn in universities because it struck down basic principles of secularism found in the constitutional order. This decision was upheld by the European Court of Human Rights. *See* Leyla ahin v. Turkey [GC], no. 44774/98, § 114-115, ECHR 2005. The main question here, as recognized by the European Court, is whether secularism is necessary for maintaining a democratic order in Turkey. *See id.* This conclusion seems problematic in light of both a broader literature on constitutionalism and in light of subsequent experience in Turkey itself — both suggest that democratic constitutionalism is robust to some religious involvement. *See, e.g.*, Roznai & Yolcu, *supra* note 161, at 204 (arguing, *inter alia*, that allowing students to wear headscarves would not contravene the constitutional secularism principle). In India, secularism crops up in a different context, as a way to tamp down on religious tensions that might unravel the multi-ethnic state and allow majoritarian religious groups to attack minority religions groups. The use might seem more justifiable in this kind of context, but it might also be redundant. Given the thickness of work on constitutional design in multiethnic democracies, designers now have a range of tools in representative bodies and elsewhere for dealing with these kinds of threats. *See generally* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (2d ed. 2000) (considering the problem); AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977) (same). It is perhaps telling that the Indian Supreme Court has used the secularist "basic structure" principle not as a way to strike down constitutional amendments, but rather as a way to *justify* declarations of emergency by the central government against ultra-religious groups. *See* S.R. Bommai v. Union of India, (1994) 2 S.C.R. 644 (upholding emergency measures replacing ultra-Hindu governors who encouraged religiously-based measures against Islamic sites, on the grounds that the actions were necessary to preserve secularism).

[173] Of course, this does not eliminate the need for difficult judicial judgments on when a given constitutional change truly threatens the democratic order, which is a topic for future work.

[174] Issacharoff, *Courts*, *supra* note 171, at 1002.

[175] *See, e.g.*, Bernal-Pulido, *supra* note 36 (justifying the constitutional replacement doctrine in hyper-presidential regimes on conceptual and normative arguments).

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interests and thus permanently reducing the quality of the democracy. This is particularly true in systems, like the Colombian, where constitutional amendment is relatively easy.[176]

This justification also helps explain the doctrine's notorious vagueness; judges and commentators often have difficulty in linking successful use of the doctrine either to individual textual provisions or to clear structural principles.[177] The reason is because the doctrine is being aimed at a moving target — it is protecting democracy from substantial movement along the spectrum towards authoritarianism, rather than at protecting any single constitutional principle in isolation.

For example, the Indian Supreme Court's most aggressive uses of the doctrine came in three key decisions that all dealt with the same underlying event — the events surrounding the "emergency" declared by Indira Gandhi, where she effectively suspended both elections and many civil liberties for two years.[178] The measures enacted by Gandhi that were struck down under the doctrine primarily comprised attempts to insulate certain core matters such as expropriation claims, nationalizations, electoral disputes, and the constitutional amendment power itself from judicial control.[179] The resonance between the kinds of measures enacted by Gandhi and modern competitive authoritarian projects is striking: she took measures both to disable electoral opposition (fraud, harassment, etc.) and to weaken key checking institutions, including the Supreme Court. The decisions taken by the Court in those years were justified less by a search for basic structural

[176] *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 374-78 (explaining the different processes for constitutional amendment, which require only a simple majority legislative approval in the first round and an absolute majority in the second).

[177] *See* Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299 (India) (expressing broad disagreement within the judicial opinions about exactly what principles of the basic structure a particular constitutional amendment violated); *see also* Albert, *Amendments*, *supra* note 165, at 23 (noting that "the contours of the basic structure doctrine remain unsettled").

[178] *See generally* Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175, 183-88 (2010) (detailing the emergency in the context of the relevant caselaw).

[179] *See* Minerva Mills v. Union of India, (1980) 4 S.C.C. 222 (amendments insulating nationalization and constitutional amendments from judicial review); Indira Nehru Gandhi v. Shri Raj Narain, (1975) 2 S.C.C. 159 (amendments insulating elections from judicial review); Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (amendments insulating expropriation from judicial review); *see also* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM: A STUDY OF THE BASIC STRUCTURE DOCTRINE 43-69 (2009).

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principles, on which the Court consistently fragmented, than by a consensus that Gandhi's actions, taken as a whole, were a substantial threat to the democratic order.[180] These decisions only chipped away at Gandhi's program, but they may have called public attention to her undermining of the democratic order.[181]

Similarly, the Colombian Constitutional Court struggled to articulate a criteria in order to distinguish a constitutional amendment allowing two consecutive presidential terms (which was upheld) and amending it to allow three consecutive terms (which was struck down). Again, however, the persuasiveness of the Court's inquiry depended on its concrete assessment of the impact on the Colombian political system. A third term would have given Uribe the power to appoint nearly all of the officials who were supposed to be checking him. Perhaps more importantly, it would have given him informal control, through patronage and other means, over nearly every aspect of the state, and would have made him nearly impossible to dislodge.[182] The Court's decision aimed at identifying a constitutional change that would have implied a substantial movement along the spectrum towards authoritarianism.

Finally, the fact that the doctrine may be used to protect basic principles of the democratic order may help to alleviate or at least problematize concerns about it being the ultimate undemocratic or counter-majoritarian act that a court can carry out. First, as noted in detail in Part I, constitutional amendment processes can easily be used to carry out the agendas of particular actors or political groups; they do not necessarily represent the will of the "people" in an uncontestable sense.[183] Second, the examples of Hungary, Venezuela,

[180] For an example, see *Shri Raj Narain*, 2 S.C.C. at 412 where the four justices voting that the electoral amendment at issue violated the basic structure doctrine did so using three different theories: democracy, equality, and structural encroachment on judicial power.

[181] *See* Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107, 120 (B.N. Kirpal et al. eds., 2000).

[182] *See supra* text accompanying notes 36–43.

[183] *See supra* Part I. I do not of course seek to adopt any single definition of the "people" for this purpose, nor do I take a position on whether such a definition is possible. As others have noted, this is an extraordinarily difficult practical undertaking, especially but not exclusively in multi-ethnic polities. *See, e.g.*, Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 738-43 (2011) (noting problems that arise in determining whether a population is sufficiently coherent to be considered one people). I merely argue that the use of the popular will by leaders such as Chavez, Correa, and the Fidesz was problematic, and that they effectively wielded a contestable claim into sweeping constitutional transformation.

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Colombia, and Ecuador all show that mechanisms of constitutional change may often be used to damage the democratic order over the long term, making it more difficult to dislodge incumbents or to hold them accountable.[184] The use of the doctrine of unconstitutional-constitutional amendments may merely be a way to protect democracy over the longer term from certain extreme exercises of political power that threaten the institutional order itself. This suggests a type of process-based defense: One common justification for judicial review is that courts have the power to take counter-majoritarian actions to protect democratic channels themselves, and in an extreme form this may describe the proper use of the doctrine of unconstitutional-constitutional amendments.[185]

Still, this justification for the doctrine raises important problems, which tend to undermine its effectiveness in practice. First, there is some evidence that the doctrine has tended to expand through time, as courts find more and more parts of the constitution to be "basic." In other words, there may be substantial risks that the doctrine tends to be over-inclusive. In some contexts, the identification of the parts of the constitutional order that are basic seems to jive surprisingly well with the constitutional court's own jurisprudence, suggesting that the doctrine is sometimes used for turf-protection.[186] For example, the Colombian Court recently suggested that a legislative attempt to recriminalize drug possession following a judicial decision decriminalizing it would likely constitute a substitution of the constitution because it would partially replace core values like human dignity and autonomy.[187] In another recent decision, the Court struck down a constitutional amendment intended to evade its decisions requiring the civil service regime to be applied retroactively to incumbent office-holders.[188] It held that the amendment infringed core

[184] *See supra* Part I.

[185] *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST 181-82 (1980) (arguing for a process-based defense of United States constitutional law, called "representation reinforcement," as a way to combat the counter-majoritarian difficulty).

[186] Consider also the recent cases in India where the Court has used the basic structure doctrine to limit efforts to set up a parallel system of administrative courts separate from the ordinary judiciary and more dependent on the government. *See* Ramachandran, *supra* note 181, at 122-23 (listing cases). It is true that this sort of action could be used as part of a plan of abusive constitutionalism, but in the context where the relevant provisions were struck down, there was no such threat.

[187] *See* Corte Constitucional [C.C.] [Constitutional Court], Julio 22, 2011, Sentencia C-574/11, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), *available at* http://corteconstitucional.gov.co/relatoria/2011/c-574-11.htm.

[188] *See* Corte Constitucional [C.C.] [Constitutional Court], Agosto 27, 2009, Sentencia C-588/09, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), *available at*

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constitutional principles protecting "meritocracy." Even for defenders of the doctrine, this expansive dynamic is disturbing. It amplifies the democratic concerns associated with the doctrine, and by making the constitution unduly rigid it may push politicians towards more disruptive mechanisms of change, especially wholesale constitutional replacement.

More importantly, there are reasons to think that the doctrine will prove to be fairly under-inclusive. It not only will tend to be used where it does not need to be used, but it will also fail where it most needs to be used. As the Colombian, Venezuelan, and Hungarian examples showed, these cases require courts to undertake decisions to stop highly popular and powerful actors in cases that touch their core interests and during periods of institutional and constitutional stress. The examples above show that courts were able to play a significant role in each case, but with varying results. Colombia remains the major positive example, where a court decision is credited with helping to save democracy in the country.[189] In Hungary, in contrast, the Constitutional Court has played a much more ambiguous role, blocking some individual measures but declining to deploy the basic structure doctrine in the face of significant political pressure.[190] Moreover, as the Fidesz continues to control the political levers in the country, it has moved towards gaining effective control over the Court. In the long run, then, the Court is unlikely to prove an effective check on the Fidesz.

There are reasons to think that the Colombian example is exceptional. As commentators have pointed out, political actors may pay a high price both internationally and domestically for flatly disobeying judicial decisions.[191] Decisions can still be ignored, and hostile courts shut down, but it may be more difficult for politicians to take these steps than it once was.[192] In that sense, courts are more

http://www.corteconstitucional.gov.co/relatoria/2009/C-588-09.htm.

[189] *See supra* Part I.B.

[190] *See supra* text accompanying notes 72–73.

[191] *See, e.g.*, Issacharoff, *Courts*, *supra* note 171, at 1010-11 (arguing that court decisions do have bite in many difficult institutional contexts, although admitting that courts sometimes fail to carry out this role or are ignored by other institutions).

[192] Still, there are several well-known examples of these practices. In Belarus, the competitive authoritarian President Alexander Lukashenko ignored constitutional court rulings holding that he had violated the Constitution sixteen times during his first two years in office. *See* LEVITSKY & WAY, *supra* note 25, at 79. In Russia, in perhaps the best known example of judicial inefficacy, President Yeltsin closed down a recalcitrant Constitutional Court after it held unconstitutional several of his decrees relating to the constitutional process. *See* Epstein et al., *supra* note 96, at 136-37.

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relevant during episodes of abusive constitutionalism than they were during classic military coups. The easier way for a hybrid or competitive authoritarian regime to control a court is to pack it — packing a court is relatively quiet, and a pocket court is highly unlikely to deploy tools like the basic structure doctrine against its own regime. Any competitive authoritarian regime that is linked to a durable political movement — as was the case in Venezuela, and is now the case in Hungary — is likely to succeed in packing its Constitutional Court once given enough time.[193]

### *D. The Theoretical Gap of Constitutional Replacement*

A final problem with the unconstitutional-constitutional amendment doctrine is that it rests on problematic theoretical foundations that leave constitutional replacement (as opposed to constitutional amendment) unprotected against abusive constitutional practices. These foundations assume that only constitutional amendment — and not constitutional replacement — raise risks of abuse. Yet as shown in Part I, both constitutional amendment and constitutional replacement raise these risks.

Faced with the anti-majoritarian critique of the unconstitutional-constitutional amendments doctrine noted above, scholars have developed an essentially process-based defense of the doctrine. Vicki Jackson, for example, has recently argued that the doctrine might be strengthened if it is viewed not as cutting off all avenues for democratic override, but instead as simply asserting that one particular method of popular change — constitutional amendment — is unavailable, and that democratic figures must proceed by using some other, more demanding procedure.[194] She calls this form of review "substantive procedural" review.[195] In some cases, this defense of the doctrine is easy to spot, as in California. As many state constitutions did at one time, the California Constitution distinguishes

[193] In Venezuela, for example, the judiciary played some role in checking Chavez early on in his presidency, but has lost its remaining independence through time. *See* Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 LAW & SOC. INQUIRY 854, 854 (2011).

[194] *See* Vicki Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*, *in* DEMOKRATIE-PERSPEKTIVEN: FESTSCHRIFT FUR BRUN-OTTO BRYDE ZUM 70. GEBURTSTAG 47, 60-62 (Michael Bauerle et al. eds., 2013) ("Tiered amendment procedures enforced through substantive procedural review has the effect of making some provisions harder, but not impossible, to amend, thereby ensuring constitutional justice commitments to retain their democratic or consensual rooting.").

[195] *See id.* at 60.

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between "amendment" and "revision," and requires revisions to go through more demanding procedures.[196] By telling the political branches that they cannot change the constitution via amendment, the California Supreme Court is in essence requiring constitutional change via the more exacting method of revision.

Most foreign constitutions do not have such an explicit two-tiered procedure for constitutional change, but it is possible to infer one if we assume that replacing the constitution is the alternative to amending it. In this way, the doctrine may again be understood as a safeguard of the constituent power of the people. The theory helps to bolster the democratic legitimacy of the doctrine by suggesting that courts applying it are merely acting as gatekeepers to shunt different kinds of change through the correct pathway, rather than altogether stopping democratic debate on a given issue. Certain changes require the higher-level deliberation implied by constitutional replacement, rather than ordinary constitutional amendment procedures.

Such a position aligns with Bruce Ackerman's two-track theory of constitutionalism in the United States. Ackerman argues that in most cases in American history, the constituted political branches acted under the rules of an existing political order, but in a few key instances (most notably after the Civil War and during the New Deal) political figures gained such enduring and deep support that they effectively acted in the name of the people to remake the Constitution.[197] The process-based defenses of the unconstitutional-constitutional amendment doctrine suggest a similar distinction between the ordinary constituted powers (which possess only a limited constitutional amendment power) and the "people" (who possess a plenary power to remake the constitutional order).

This also appears to be how the doctrine is understood in many of the systems that regularly use it. For example, the Indian Supreme Court has held that the basic structure doctrine is a limitation on article 368 — which governs Parliament's power to amend the Constitution — and so presumably not on the power of a Constituent Assembly or other entity to replace the Constitution.[198] More explicitly, the Colombian Constitutional Court has held that the "substitution of the Constitution doctrine" limits constitutional

[196] *See supra* text accompanying note 163.

[197] *See* ACKERMAN, *supra* note 140, at 6-7 (1991) ("[A] dualist constitution seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government.")

[198] *See* KRISHNASWAMY, *supra* note 179, at 30 (noting that the *Kesavananda* court made an important distinction between amendment and replacement).

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amendment by Parliament or via referendum, but not constitutional replacement by Constituent Assembly.[199] According to the Colombian Court, only the people acting through a constituent assembly can exercise the "original constituent power" necessary to make certain fundamental changes to the constitutional order.[200]

The theoretical defense of the unconstitutional-constitutional amendments doctrine therefore assumes a complete distinction between constitutional amendment and constitutional replacement. It assumes that only amendment is subject to abusive constitutional practices, while constitutional replacement is always carried out by the people themselves. These arguments have had a significant impact on comparative constitutional theory and practice. In academic work, it links back to the classical conception of constitution-making views as a legally uncontrolled and uncontrollable act.[201] Traditional theorists Emmanuel Joseph Sieyes and Carl Schmitt envision constitution-making as an act carried out by a power that is of necessity superior to any existing political force.[202] This has become known as the theory of "original constituent power." Sieyes for example writes that the national will is not subject to a constitution, while Schmitt argues that constitutions are created by acts of political will and that this will coexists even once constitutions have been drafted. Both theorists suggest a vision of what Joel Colon-Rios has called "weak constitutionalism" — the idea that the people have the inherent power to remake their constitutional order at any time, unconstrained by the existing political order.[203] Many scholars, including Bruce Ackerman, have expressed dissatisfaction with the Sieyes/Schmitt view of

[199] *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], Octubre 19, 2005, Sentencia C-1040/05, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2005/C-1040-05.htm.

[200] The Colombian Constitution explicitly contemplates constitutional amendment or replacement by Constituent Assembly. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 376.

[201] *See* Landau, *Constitution-Making*, *supra* note 1, at 932.

[202] *See* CARL SCHMITT, CONSTITUTIONAL THEORY 125-26 (Jeffrey Seitzer trans., 2008); EMMANUEL JOSEPH SIEYES, WHAT IS THE THIRD ESTATE? 17 (1963). I do not mean to imply that these two theories are identical; some important differences are discussed in JOEL COLON RIOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER 88 (2012).

[203] *See* RIOS, *supra* note 202, at 1-2; *see also* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 394-96 (1995) (arguing that constitution-making via popular devices like constituent assemblies will produce a better product and allow for more deliberation in the polity).

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constitution-making, but none have really offered a mechanism for restraining abusive constitutional replacement.[204]

The Sieyes/Schmitt vision has also left important imprints at the level of both doctrine and constitutional design.[205] The doctrine of original constituent power holds that the people retain their inherent right to step outside the existing constitutional order and to replace the constitutional text at any time. The constitutional order constrains the "constituted powers" set up by the text, but cannot constrain the "people" from remaking their constitutional order. At the level of constitutional design, relatively few constitutions contain any clause to regulate their own replacement, since replacement is seen as an act that takes place outside the constitutional order. Moreover, exercises of "original constituent power" are seen as associated with the popular will, and therefore devices like constituent assemblies and referenda are normally thought to be consistent with the doctrine. Thus, when constitutional replacement is regulated in constitutional texts, it is generally activated through the use of these devices, and can be regulated through popular mechanisms that are either less demanding or arguably no more demanding than those needed to amend the constitution.[206]

[204] *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS 11 (1998) (carefully distinguishing the theory of original constituent power from his theory of American constitutional transformation, and asserting that the former is the point where "law ends, and pure politics (or war) begins"); Andrew Arato, *Forms of Constitution-Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 230-31 (1995) (rejecting a "sovereign" model of constitution-making as overly majoritarian and as not allowing for sequential learning). Arato has a highly-developed model of "post-sovereign" constitution-making that relies on roundtable discussions and external constraints by courts or other bodies. *See* ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION 59-98 (2000). But this cooperation in his theory emerges endogenously and is not a product of provisions in the existing constitutional text, perhaps because he focuses on transitions from authoritarian regimes rather than constitution-making within already-democratic regimes.

[205] Rios and Hutchinson argue that references to "constituent power" have largely disappeared from American constitutional theory. *See* Joel Colon-Rios and Allen Hutchinson, *Democracy and Revolution: An Enduring Relationship?*, 89 DENV. U. L. REV. 593, 597 (2012). The assertion is more questionable both on the level of foreign constitutional theory and comparative constitutional practice by courts and politicians, where the doctrine remains popular. For some examples of the use of the "original constituent power" doctrine from Latin America, see Landau, *Constitution-Making*, *supra* note 1, at 965-66.

[206] A striking example of this sort of vague, populist constitution-making language occurs in Germany, where the Basic Law was explicitly thought to be a temporary text to be replaced upon unification. The relevant clause states: "This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted

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The problem is that constitutional replacement is also part of the toolkit of abusive constitutional regimes — by controlling the processes that trigger replacement or the process of constitution-making itself, powerful figures and movements can reshape the constitutional order efficiently in a way that suits their interests. The examples drawn from Venezuela, Ecuador, and Hungary show that constitutional amendment and constitutional replacement are viewed by would-be authoritarian actors as complementary mechanisms. Indeed, the two tools are often deployed by political figures either as substitutes or as part of a common package used to entrench individuals or groups in power. The Ecuadorian and Venezuelan cases demonstrate the former pattern, where Chavez and Correa turned towards constitutional replacement because they would have had difficulty forcing amendment through accepted channels.[207] The Hungarian case demonstrates the latter pattern — the Fidesz took sufficient control of Parliament to both reform and replace the Constitution, and used both powers strategically to entrench its own power and to neutralize opposition to its project.[208]

Constitutional replacement, then, remains largely unregulated in constitutional theory and practice, and this makes it liable to abuse by powerful actors or groups purporting to act in the name of the people. The failure to regulate processes of constitutional replacement is a significant gap in modern constitutional theory. It might be valuable for constitutional texts to regulate two different types of issues: the conditions under which the existing constitution may be replaced, and the process for making a new constitution.[209] This kind of

by the German people takes effect." GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) art. 146. This provision forms a startling gap in a constitutional order that otherwise protects itself against abusive constitutional change, both through "militant democracy" and unamendable provisions. *See* Kay, *supra* note 183, at 726-27; *see also* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 376 (Colom.) (allowing a Constituent Assembly, with undefined procedures and characteristics, to be called by a majority vote in Congress, followed by approval in a referendum); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, arts. 348-349 (Ven.) (allowing a Constituent Assembly replacing the Constitution to be called by either the President, two-thirds of Congress, two-thirds of local governments, or fifteen percent of voters).

[207] *See supra* Part I.C.

[208] *See supra* Part I.D.

[209] An alternative to textual replacement clauses would be a judge-made unconstitutional-constitutional replacement doctrine — in other words, an assumption that the new constitutional text is bound by certain fundamental principles of the existing constitutional order, and that judges are charged with policing those limits. This is conceptually possible: the South African interim

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constitutional replacement provision does not exist anywhere, although elements of it are present in various constitutional designs.[210] Note that my argument here does not wade into the complex jurisprudential debate about whether existing constitutions can as a theoretical matter control new constitution-making efforts, or whether those efforts jurisprudentially stand outside of the existing order. The point instead is a pragmatic one: these clauses might have sociological and psychological effects on the expectations of citizens, altering practices in useful ways by lessening the probability of a destructive rupture.

Thresholds for triggering constitutional replacement might be made considerably higher than those for ordinary constitutional amendment and not, as in Hungary, equal to or less stringent than the amendment threshold.[211] This follows from the fact that replacement is ordinarily more destructive of the constitutional order. And if replacement mechanisms are meant to be popular end-runs around existing institutions, then they should be difficult both to activate and to pass. For example, a replacement mechanism via referendum might require ten percent of registered voters to be placed on the ballot, and perhaps seventy-five percent of registered voters to be successful. This is also another area where temporal restrictions might be useful: voters could, for example, be required to vote twice in favor of authorizing a constituent assembly, with a gap of at least one intervening election separating the two votes.[212] As in the constitutional amendment context, the use of time would be helpful to guard against

constitution for example contained fundamental principles that had to be adhered to in the final constitutional text, and those principles were enforced by the Constitutional Court. *See, e.g.*, Andrew Arato, *Post-Sovereign Constitution-Making and its Pathology in Iraq*, 51 N.Y.L. SCH. L. REV. 535, 539 (2006) [hereinafter *Pathology in Iraq*] (outlining the South Africa two-stage model). The South African case was extraordinary in that the principles were textual rather than judge-made. A wholly judge-made doctrine would face severe problems from both the standpoints of democratic theory and practical enforceability. In Venezuela, for example, the Supreme Court's attempts to make the constitution-making process comply with the "spirit" of the existing constitution proved ineffective. *See supra* text accompanying notes 50-54. Moreover, unlike an unconstitutional-constitutional amendments doctrine, an unconstitutional-constitutional replacement doctrine truly would seem to take away any mechanism through which a polity could carry out certain fundamental changes to the constitutional order.

[210] *See infra* note 211.

[211] *See supra* note 74 (noting that the amendment and replacement thresholds were identical in Hungary because the country never passed a permanent constitution after the democratic transition).

[212] *See supra* text accompanying notes 149-150 (exploring the utility of temporal limitations in the constitutional amendment process).

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constitutional replacement that is carried out merely to serve the interests of particular political actors or groups.

Further, these replacement clauses could regulate the constitution-making process itself. Constitutions could, for example, impose super-majoritarian requirements for the votes of any constitutional assembly that might be called under such a provision, and might also regulate the electoral rules that would be used to choose such an Assembly.[213] These requirements are important because they would ensure that the constitution-making process could not be hijacked for majoritarian ends. A number of scholars have argued that majoritarian models of constitution-making tend to lead to poor results, and that models should instead seek to encourage consensus.[214]

There is, of course, some risk that these clauses might be ignored. Constitutional replacement tends to occur at moments of political crisis in a polity, and at those moments legal restraints on power tend to be inoperative. Courts attempting to enforce restraints in those environments may reach the limits of their "zones of tolerance," and either be ignored or shut down for issuing hostile decisions.[215] But as already noted, political actors seeking to create hybrid regimes will likely be wary of disobeying clear constitutional texts; such actions

[213] The new Bolivian Constitution of 2009 has a replacement clause that does a poor job of regulating the initiation of constitution-making, but is unusual in attempting to regulate the constitution-making process along the lines suggested here. The clause provides that an "original full-powered Constituent Assembly" may be initiated by twenty percent of the electorate, an absolute majority of the Legislative Assembly, or the President, and the proposal must be approved by referendum. CONSTITUCIÓN POLÍTICA DEL ESTADO (CONST. BOL.) (2009), art. 411 (Bol.). This structure, like that of Ecuador and Venezuela, is subject to populist manipulation by a strong president. *See supra* note 204. However, the Bolivian Constitution also provides that decisions of the Assembly must be taken by two-thirds majority, and then approved in referendum. *See* CONST. BOL. (2009), art. 411. This kind of provision at least gestures towards an effective regulation of the constitution-making process, although it leaves key questions unanswered (such as the electoral rules used to select an Assembly). A similar clause was in place when the 2009 Constitution was written, and it may have helped to constrain an extremely messy process somewhat, producing a consensus Constitution. *See* Landau, *Constitution-Making*, *supra* note 1, at 956-57 (noting that the rules were threatened at various points but ultimately followed).

[214] *See, e.g.*, Arato, *Pathology in Iraq*, *supra* note 209, at 538-49 (arguing for a post-sovereign model of constitution-making); Landau, *Constitution-Making*, *supra* note 1, at 934-38 (arguing for a model of constitutionalism that focuses on worst-case outcomes — breakdowns of order or slides of democracy into competitive authoritarian regimes); Partlett, *supra* note 89, at 237-38 (arguing that the Russian experience shows the dangers of an unrestrained constitution-making process).

[215] *See, e.g.*, Epstein et al., *supra* note 96 (noting that the Russian Constitutional Court, attempting to constrain Yeltsin during the Russian constitution-making process, reached the limit of its zone of tolerance and was shut down).

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would risk falling afoul of the democracy clauses examined earlier and would potentially cost regimes domestic and international legitimacy. Clear regulation both of the conditions under which constitutional replacement can occur and of the process that should be followed during constitution-making should have at least some impact on restraining abusive constitutionalism. It seems probable, for example, that both the Fidesz in Hungary and Chavez in Venezuela would have abided by more demanding constitutional rules if they had existed. Both actors seemed wary of committing overtly illegal (as opposed to legally ambiguous) acts.

A more substantial set of objections to constitutional replacement clauses stems from the fact there are at least three kinds of lines that may be difficult or impossible for such a clause to draw. First, it is very difficult to distinguish "genuine" exercises of the popular will from "false" or "manipulated" exercises. A replacement clause, in preventing some "inauthentic" acts of constitution-making, would likely also prevent some "authentic" acts. Second, as Sujit Choudry has argued, there are situations that constitutions cannot properly be understood to regulate, and yet it is very difficult to distinguish those situations from ones that are properly understood as within the existing constitutional order.[216] There is a real risk that a replacement clause might try and over-regulate, controlling situations that are better dealt with outside the existing constitutional order. Finally, in a more pragmatic vein, there are situations where it is better to replace an existing constitution than maintain it. Constitutional longevity is not an unalloyed good. Tom Ginsburg, Zachary Elkins, and James Melton give an obvious example — the Lebanese Constitution of 1926, which set up a rigid power-sharing arrangement between Muslims and Christians that broke down as demography changed, and which was only resolved after a long civil war.[217] Yet it would be difficult for a replacement clause to distinguish situations where replacement is unnecessary from situations where it is necessary, and there is a risk that a replacement clause would maintain some bad constitutions in place.

[216] *See* Choudhry, *supra* note 141, at 229 (arguing that constitutional designers must realize that there are points at which constitutionalism will inevitably fail). Choudhry was speaking of Ackerman-style constitutional moments within a given constitutional order, rather than replacements of constitutions.

[217] *See* TOM GINSBURG ET AL., *supra* note 138, at 34-35 (noting a modest preference in favor of constitutional stability in most circumstances, but acknowledging situations in which constitutions should be replaced).

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All of these problems ought to give scholars humility before recommending that replacement clauses be incorporated, even if they do not necessarily eviscerate their value. At this point, it is sufficient to say that the failure to deal with the problem of constitutional replacement is a substantial gap in modern constitutional theory and design. The practices of abusive constitutionalism show how constitutions can be replaced opportunistically by powerful leaders in ways that are very destructive of the democratic order. Yet while theorists and courts have developed elaborate techniques and doctrines to control constitutional amendment, they have left constitutional replacement as a kind of black box.

## III. A CRITICAL REVIEW OF ESTABLISHED AND EMERGING RESPONSES IN INTERNATIONAL LAW

Democratic defense mechanisms are less developed in international law than in comparative constitutional law. It has long been noted that there is no full-fledged international law of democracy. Historically, such matters were seen as concerning internal governance, and thus beyond the concern of international law.[218] Even after the human rights revolution in the post–World War II period, which has reshaped the way states treat their own citizens, the form of government has remained largely outside the scope of international law.

Nonetheless, for several decades scholars have asserted that a human right to democracy is emerging, and that international law is no longer neutral on the question of the form of government.[219] These scholars cobble together a number of global and regional treaties, declarations of the U.N. General Assembly, and other sources in drawing this conclusion. For example, the International Covenant on Civil and Political Rights, while not mandating a form of government, includes relevant rights like the right to freedom of expression, association, and voting.[220] Furthermore, the Outcome Document of

[218] *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) (admitting that historically matters of internal governance were outside the province of international law).

[219] *See, e.g.*, Fox & Nolte, *supra* note 109, at 6 (noting that "issues of domestic governance [are moving] from the exclusive realm of national constitutional law and enter[ing] the purview of international human rights law"); Franck, *supra* note 218 (arguing that democracy is in the process of becoming a principle of public international law).

[220] *See* International Covenant on Civil and Political Rights arts. 19, 22, 25, Mar. 23, 1976, 999 U.N.T.S. 171.

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the 2005 World Summit declared democracy to be a "universal value."[221]

My purpose here is not to critically examine this vast literature.[222] Instead, I restrict myself to examining, in section III(A), the main enforcement mechanism that has emerged at the regional level, the democracy clause.[223] These type of clauses generally suspend membership in regional organizations or offer other sanctions to states experiencing "unconstitutional interruptions" in their democratic order or meeting other, similar conditions. These clauses may be fairly effective at detecting military coups and other obvious breaches in the democratic order, but they do not function well in combatting abusive constitutionalism. The mechanisms of abusive constitutionalism are too subtle and ambiguous to clearly trigger the clauses — for example, it is often unclear whether or not the action is "unconstitutional," or whether the democratic order has been "interrupted." Thus, the democracy clause appears to be of limited use against what is now emerging as the main threat to democracy.

Section III(B) considers emerging responses, in practice or in scholarship, which would thicken the scope of review at the international level. Most radical among these is the recent Tunisian proposal, made before the U.N. General Assembly last year, for an International Constitutional Court that would act as an international arbiter of abusive actions. I do not dismiss these emerging possibilities

[221] G.A. Res. 60/1, ¶ 135, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[222] For some key contributions, see, for example, Fox & Nolte, *supra* note 109 (arguing that such a right is emerging); Franck, *supra* note 218 (likewise). *See also* Gregory H. Fox, *Democracy, Right to, International Protection*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 35-36 (2012), *available at* http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e773&recno=1&author=Fox%20%20Gregory%20H (concluding that a right continues to emerge but is hampered over disagreement about the definition of democracy and because of regional differences); Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 1, 2 (Gregory H. Fox & Brad R. Roth eds., 2000) ("[I]t is now clear that international law and international organizations are no longer indifferent to the internal character of regimes exercising effective control within 'sovereign' States."); Marks, *supra* note 17, at 522-24 (arguing that the idea of such an entitlement remains unsettled and problematic in international law).

[223] I do not engage the controversial question of pro-democratic intervention. *See, e.g.*, Bruce Bueno de Mesquita & George Downs, *Intervention and Democracy*, 60 INT'L ORG. 627, 647 (2006) (finding empirical data that democratic intervention is rarely likely to make a positive contribution); Simone van den Driest, *Pro-Democratic Intervention and the Right to Political Self-Determination: The Case of Operation Iraqi Freedom*, 57 NED. INT'L L. REV. 29, 46-48 (2010) (arguing that democratic intervention endangers international rights to self-determination).

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out of hand, but I do point out the great difficulties involved in making them effective against abusive constitutionalism.

### *A. Democracy Clauses*

In the Americas, as in Africa, and under documents governing the Commonwealth countries, a major mechanism of enforcement is the so-called "democracy clause."[224] These clauses provide that under certain circumstances, a transition from a democratic to a non-democratic regime will be punished by international actors in the region. The Latin American version of the clause provides that a country may be suspended from the Organization of American States ("OAS") if its "democratically constituted government has been overthrown by force."[225] Other relevant documents in the OAS system provide for suspension in the event of an "unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state."[226] The clause contained in the Charter of the African Union similarly states that "[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union," and provides for sets of sanctions against those regimes.[227] Finally, the Commonwealth version of the clause is triggered "particularly in the event of an unconstitutional overthrow of a democratically elected government," and lays out a similar regime of sanctions.[228] There is no doubt that coups have fallen sharply in the historically coup-plagued regions adopting these clauses, as they have worldwide.[229] It is, however,

[224] For a general discussion, see, for example, Theodore J. Piccone, *International Mechanisms for Protecting Democracy*, *in* PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES 101, 101 (Morton H. Halperin & Mirna Galic eds., 2005).

[225] Charter of the Organization of American States art. 9, Dec. 13, 1951, 119 U.N.T.S. 3.

[226] Inter-American Democratic Charter art. 19, Sept. 11, 2001, 40 I.L.M. 1289, *available at* http://www.oas.org/charter/docs/resolution1_en_p4.htm. Note that the Inter-American Democratic Charter, while approved by the General Assembly of the OAS, is not itself a treaty and thus has an uncertain status under international law. *See, e.g.*, Piccone, *supra* note 224, at 105 (noting that the Charter is not a treaty but "is another step forward towards devising an inter-American system for preventing and responding to breakdowns in democratic governance").

[227] Constitutive Act of the African Union art. 30, July 11, 2000, 2158 U.N.T.S. 3.

[228] Millbrook Commonwealth Action Programme on the Harare Declaration art. 3, Nov. 1995, *available at* http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=35800.

[229] *See* CENTER FOR SYSTEMATIC PEACE, POLITY IV: REGIME AUTHORITY

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difficult to tell whether the drop is caused by these clauses or by broader changes in political and social attitudes.[230]

My point here is that however effective these clauses might be at deterring or punishing coups, they are much harder to invoke against the kinds of abusive constitutional actions surveyed in Part I. The main reason is because these clauses generally require "unconstitutional" action, and often further that the action "interrupt[s]" or "overthrows" a democratic government or order. It is often possible to gain a consensus that these conditions have been met with respect to a classic military coup. But it is far more difficult with respect to an incumbent government taking abusive constitutional action to weaken the democratic order. Sometimes these actions will appear to be clearly constitutional; in most other cases constitutionality is at least ambiguous. Further, these types of actions by incumbent governments may not seem to "overthrow" or "interrupt" a democratic order, since the same incumbents tend to continue in government.

A recent example of abusive constitutionalism highlights the point: the invocation of the OAS democracy clause in Honduras.[231] The illuminating thing about the Honduran incident is that it involved two clear dangers to democracy: the abusive constitutional maneuvers of then-incumbent President Manuel Zelaya, who sought to entrench himself in power by replacing the existing constitution and likely by removing term limits, and the military's removal of Zelaya from power

CHARACTERISTICS AND TRANSITIONS DATASETS: COUPS D' ETAT, 1946–2011, *available at* http://www.systemicpeace.org/inscr/inscr.htm (finding a steady drop in the frequency of coups since the 1960s).

[230] For a study concluding that the African clause did indeed deter a number of coups, see Jonathan Powell & Trace Lasley, Constitutional Norms and the Decline of the Coup d' Etat: An Empirical Assessment 19, Paper Presented at the Annual Meeting of the Southern Political Science Association (unpublished manuscript) (on file with author), *available at* http://citation.allacademic.com/meta/p_mla_apa_research_citation/5/4/4/3/0/p544304_index.html?phpsessid=995ab0d34f7dde965dabbc7730edeb67.

[231] The Honduran example has been extensively discussed in recent work. *See, e.g.*, Albert, *Handcuffs*, *supra* note 142, at 690-93 (arguing that the complete unamendability of the presidential reelection provision contributed to the crisis); Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149, 159 (2013) (viewing the Honduras affair as an example of the growing phenomenon of extra-territorial constitutional interpretation). The author served as part of a team of academics consulting for the Honduran Commission on Truth and Reconciliation, and evaluating the legality of the actions both of President Zelaya and of those who removed him from power. The report was issued in 2011. *See* Feldman, Landau, Sheppard & Rosa-Suazo, *supra* note 5, at 8.

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and from the country.[232] Yet only the second action (which was viewed by the international community as a clear "coup") was perceived as a danger to democracy, even though it was far from clear that it was the more significant of the two threats.

Manuel Zelaya was elected president in 2006 as a member of one of the country's two major parties, but alienated both the opposition party and elements of his own party as he pursued an increasingly populist agenda and turned towards Venezuela's Hugo Chavez. Zelaya joined regional economic and foreign policy organizations created by Chavez and criticized the existing political parties as corrupt and illegitimate.[233] The charge rang true in Honduras' impoverished and highly unequal economy, but it started to distance Zelaya from even some members of his own party. Moreover, in 2008 Zelaya began to take steps to replace the existing constitution. Following a playbook that was similar to those already used in Venezuela, Bolivia, and Ecuador, he argued that the existing text was discredited and obsolete, and thus needed to be replaced with an updated text written at a new constituent assembly.[234] He was never particularly forthcoming about what his plans for the new text were, but numerous commentators and people around Zelaya suggested that at least one key purpose of the Assembly would be to give Zelaya a second term in office.[235]

As in many cases involving abusive constitutionalism, the legality of the steps pursued by Zelaya was unclear. The root problem is that the Honduran Constitution, like most constitutions, has provisions for

[232] I do not mean to imply that the democracy clause is the only mechanism in the Americas that is designed to protect democracy. As has been detailed elsewhere, the system also includes other mechanisms, especially Electoral Observation missions, undertaken with the consent of a given country. *See, e.g.*, Ruben M. Perina, *The Role of the Organization of American States*, *in* PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES 127, 145 (Morton H. Halperin & Mirna Galic eds., 2005) (stating that electoral observation missions are "one of the primary and most visible activities" of the Unit for the Promotion of Democracy of the OAS). However, these mechanisms also often prove problematic when dealing with competitive authoritarian regimes. While such regimes may appear to have free and fair elections on the day of the election itself, incumbents stack the deck between elections by controlling media, financing, and other resources. *See* Steven Levitsky & Lucan Way, *Why Democracy Needs a Level Playing Field*, J. DEMOCRACY, Jan. 2010, at 58-60.

[233] *See* Feldman, Landau, Sheppard & Rosa-Suazo, *supra* note 5, at 10 (recounting Zelaya's efforts to join Petro Caribe and the Bolivarian Alternative for the Peoples of Our America, both organizations controlled by Chavez).

[234] *See Buscan crear vacío de poder en Honduras*, EL HERALDO (Hon.) (Jan. 17, 2009), http://archivo.elheraldo.hn/content/view/full/69737.

[235] *See id.*

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amendment but not replacement.[236] The text does not discuss the conditions under which the existing Honduran constitutional order may be replaced. Moreover, the Honduran Constitution contains certain provisions that are alleged to be unamendable by any method (the so-called "petrified" articles): one such provision limits presidents to only one term in office.[237] This added an additional layer of complexity, because even if replacement per se would be constitutional, it is possible that it would be found unconstitutional to the extent that it amended the "petrified" clauses.[238]

At any rate, an administrative court issued a decision and several subsequent orders requiring Zelaya to desist from carrying out the non-binding referendum; appeals against this order to the Supreme Court were not successful.[239] Zelaya claimed that these orders were themselves illegal, and pushed forward with his plans for a non-binding referendum. Several days before the vote was to have been held, his supporters broke into a military base and took ballots and other materials needed to hold the vote.[240] The OAS did not threaten Zelaya under its democracy clause. Instead, the organization's Secretary General agreed — at Zelaya's invitation — to send an

[236] The relevant amendment provision provides that amendment may be undertaken by a two-thirds vote in two consecutive ordinary sessions of the National Congress. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS (CONST. HOND.), art. 373 (Hond.).

[237] *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS (CONST. HOND.), art. 374 (Hond.) ("The prior article, the present one, the articles referring to the form of government, the national territory, the presidential term, the prohibition on again being President of the Republic by any citizen who has exercised it under any title, and the reference to those who cannot be President of the Republic in the following period may not be reformed."); *see also id.* art. 239 ("The citizen who has exercised the Executive Power may not be elected President or Vice-President of the Republic. He who breaks this disposition or proposes its reform, along with those who support him directly or indirectly, will immediately cease in the enjoyment of their respective charges and will remain ineligible for ten years from exercising any public function.").

[238] Further, the steps proposed by Zelaya included few guarantees of a fair process. For example, rather than having the Supreme Electoral Tribunal supervise a supposedly non-binding referendum on whether to go forward with the Constituent Assembly, as was customary for all national elections, Zelaya's decree purported to put supervision in the hands of the military and vote counting in the hands of the agency that conducted the census. *See* Feldman, Landau, Sheppard & Rosa-Suazo, *supra* note 5, at 32-35.

[239] *See id.* at 25-28.

[240] *'Mel' empieza a quedarse sin respaldo*, EL HERALDO (Hon.) (June 26, 2009), http://archivo.elheraldo.hn/content/view/full/156725.

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"Accompaniment Mission" to "witness" the polls on the day of his vote.[241]

Two days before the vote, on the morning of June 28, 2009, various high-ranking members of the military entered the presidential palace and told Zelaya that he had to come with them — he was put on a plane and flown to Costa Rica, where he later held a press conference, still in his pajamas.[242] The military claimed to have detained Zelaya on the authority of an arrest warrant issued by the Supreme Court, although the warrant ordered Zelaya taken in front of the Court and not removed from the country.[243] Later that day, the Congress met, purporting by wide majorities to "separate" Zelaya from his post and to appoint a replacement to serve out the rest of his term, the then-President of Congress Roberto Michelleti.[244]

The international reaction to the removal of Zelaya, particularly at the OAS, was fiercely negative. The incident was referred to as a "coup" by virtually everyone in the region, and all actors called for Zelaya to be reinstated in his office.[245] After some short-lived diplomatic efforts by the Secretary-General of the OAS failed, the organization suspended Honduras under the anti-coup clause, with all thirty-three member states voting in favor of the suspension.[246] The resolution referred to the removal of Zelaya as a "coup d'état" and found that it constituted an "unconstitutional interruption of the

[241] Note that the Secretary General referred to this mission as an "accompaniment mission" rather than as a mission of "electoral observers." *See* HUMAN RIGHTS FOUNDATION, THE FACTS AND THE LAW BEHIND THE DEMOCRATIC CRISIS OF HONDURAS, 2009: A CONSTITUTIONAL AND INTERNATIONAL DEMOCRACY LAW ANALYSIS 109-10 (2010), http://www.thehrf.com/HRF_TheFactsAndTheLaw_Honduras2009.pdf.

[242] *Michelleti sucede a 'Mel*,*'* LA TRIBUNA (Hon.) (June 29, 2009), *available at* http://old.latribuna.hn/2009/06/29/micheletti-sucede-a-"mel"/.

[243] *See id.*

[244] This congressional action was potentially problematic, because the Constitution contained no provision allowing for congressional removal of the president or of other officials. Only the Supreme Court, after criminal trial, had a clear power to remove a president. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS (CONST. HOND.), art. 313, cl. 2 (Hon.).

[245] *See UN Backs Honduras Leader's Return*, BBC NEWS (June 30, 2009), http://news.bbc.co.uk/2/hi/americas/8127503.stm (collecting condemnations issued by government agencies, by the OAS, and by the United Nations General Assembly); *see also* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, HONDURAS: HUMAN RIGHTS AND THE COUP D' ETAT 1 (2009) (concluding that the events in Honduras constituted a "coup"), *available at* http://www.cidh.org/pdf%20files/HONDURAS2009ENG.pdf.

[246] *See* Ginger Thompson & Marc Lacey, *O.A.S. Votes to Suspend Honduras Over Coup*, N.Y. TIMES (July 4, 2009), http://www.nytimes.com/2009/07/05/world/americas/05honduras.html?pagewanted=all&_r=0.

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democratic order" under the democracy clause.[247] Many major countries sanctioned Honduras, including aid cutoffs from both the United States and the European Union.[248] The suspension was not lifted until two years later, after Honduras had had an intervening election.[249]

The Honduras incident is illustrative for showing the weaknesses of democracy clauses as applied to abusive constitutionalism. The military's removal of Zelaya triggered a strong response under the democracy clause because it replaced a democratic government in flagrant violation of constitutional norms.[250] It brought back memories of the military governments of the 1970s and 1980s, and thus provoked a strong reaction from the region. In contrast, the actions of Zelaya were difficult to shoe-horn under the clause. The constitutionality of many of his actions appeared to rest on delicate constitutional judgments, and there was no single point where the constitutional order appeared to have been "interrupted" or "suspended."

Nonetheless, the threat posed by Zelaya to the democratic order was fairly serious. While the military did remove Zelaya from power in obvious violation of constitutional norms, it showed no interest in governing, instead turning over power to the President of Congress. Zelaya, in contrast, seemed poised to take unilateral action to replace the existing constitution, against the wishes of the other branches of government. While his concrete plans for the new constitutional order were unclear, there were obvious examples from other recent constitution-making experiences in neighboring countries —

[247] *See* ORG. AM. STATES, *Press Release, Organization of American States, OAS Suspends Membership of Honduras* (July 5, 2009), http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-219/09.

[248] *See* PETER J. MEYER, CONG. RES. SERV., HONDURAN-U.S. RELATIONS 16 (2013), *available at* http://www.fas.org/sgp/crs/row/RL34027.pdf.

[249] *See OAS Lifts Honduras Suspension After Zelaya Agreement*, BBC NEWS (June 1, 2011), http://www.bbc.co.uk/news/world-latin-america-13622939.

[250] Few actors seriously contended, for example, that the military's removal of Zelaya was constitutional. However, the legality of certain actions surrounding the removal has been more controversial. Actors have taken both sides of the question on the issue of whether congress had the power to "separate" Zelaya from office. *Compare* Feldman, Landau, Sheppard & Rosa-Suazo, *supra* note 5, at 57-61 (concluding that the attempt was unconstitutional), *and* HUMAN RIGHTS FOUNDATION, *supra* note 241 (same), *with* Dixon & Jackson, *supra* note 231, at 174-80 (noting the disagreement in evaluations of the congressional action), *and* Frank M. Walsh, *The Honduran Constitution is not a Suicide Pact: The Legality of Honduran President Manuel Zelaya's Removal*, 38 GA. J. INT'L & COMP. L. 339 (2010) (concluding that removal power could be implied under the circumstances).

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Venezuela and Ecuador — that the replacement process could be used to greatly entrench the power of an incumbent president and to disable competing institutions. The differential response of international regional institutions to Zelaya and to the regime that replaced him did not make sense from the standpoint of democracy promotion.[251]

### *B. Emerging and Proposed Responses at the International Level: Towards a Global Constitutional Court?*

Can the democracy clause be improved or rewritten to deal more effectively with abusive constitutional practices, or is a more effective alternative regime possible? These questions are important because they will determine how much of a role international law can have in preventing the emergence of competitive authoritarian regimes in the future. A full answer to this question is, most likely, an article unto itself. But I can offer some tentative suggestions about the route that such improvement might take.

One possibility would be to enforce the existing clauses more rigorously, so that they catch not only blatant constitutional ruptures like military coups, but also more ambiguous constitutional violations by incumbent governments, such as those undertaken in Venezuela, Ecuador, and Honduras.[252] This path should probably be rejected. Many acts of abusive constitutionalism — for example, those in Hungary — seem unambiguously to follow prevailing constitutional norms. And for those that are ambiguous, a declaration by international actors that the action was in fact "unconstitutional" would require difficult and controversial constitutional judgments by "outsiders" to the constitutional order.

As Vicki Jackson and Rosalind Dixon have recently argued, this kind of "extra-territorial constitutional interpretation" seems problematic, especially when taken in controversial cases and when used coercively.[253] A good example is offered by recent events in

[251] This is not to say that the OAS was unwarranted in sanctioning the removal. There are still likely good reasons to sanction military interventions in politics. Moreover, the action destabilized the country and led to some human rights abuses. *See, e.g.*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 245 (detailing the use of states of exception and collecting evidence of human rights abuses).

[252] *See* Piccone, *supra* note 224, at 122-23 (arguing that the clauses could be utilized to cover cases of "democratic erosion" as well as sharp ruptures of the democratic order such as coups).

[253] *See* Dixon & Jackson, *supra* note 231, at 154-56 (developing the concept of "extra-territorial" constitutional interpretation).

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Paraguay, where many Latin American countries suggested again invoking the OAS democracy clause after an incumbent president was impeached.[254] The impeachment received the requisite number of congressional votes, but occurred extremely quickly, leading many in the international community to label it a "parliamentary coup" that lacked the requisite "due process."[255] But since the Paraguayan Constitution fails to spell out what kind of due process is required for impeachment, or even whether any due process is required, such a judgment would require delicate constitutional judgments by international institutions with no particular knowledge of Paraguayan constitutional law. It seems doubtful that those judgments are either feasible or desirable, and such interventions would likely be taken for political purposes rather than with the effect of improving democracy.[256]

A second possibility would be to provide for specific constitutional "recipes" across countries — requiring, for example, that constitutions include certain elements such as ombudsmen, constitutional courts, etc. This "thickened" conception of democracy also seems unlikely to work in practice. It would require a consensus on constitutional design that does not appear to exist in most parts of the world.[257] More fundamentally, abusive constitutionalist practices can work by constructing constitutions that seem democratic in their individual parts, but are authoritarian in their overall interaction or in the ways in which institutions function in practice. Checking institutions like courts or ombudsmen exist in all of these regimes; they are simply packed or otherwise rendered ineffective. Kim Lane Scheppele has recently labeled the new Hungarian state a "Frankenstate" — democratic-seeming in its individual details, but with a monstrous overall effect.[258] A constitutional order could easily be devised that

[254] *See Paraguay: President Impeached*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/22/world/americas/paraguay-president-impeached.html?_r=0.

[255] *See Lugo Denounces Removal from Paraguay Presidency as Coup*, BBC NEWS (June 24, 2012), http://www.bbc.co.uk/news/world-latin-america-18569378.

[256] *See* Stephen Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417, 479-80 (2008) (noting that internal legal struggles can be "lethal" for democracy, but expressing doubt that international intervention can work in a productive fashion).

[257] *See* Schnably, *Constitutionalism*, *supra* note 18, at 198 (arguing that "[c]onstitutional design is too fluid, too tied to each country's own history, culture, politics, and economics" to make a thicker consensus on democracy within the Americas possible).

[258] *See* Kim Lane Scheppele, *Not Your Father's Authoritarianism: The Creation of the "Frankenstate,"* EPS NEWSLETTER (Am. Political Sci. Ass'n, European Politics & Soc'y Section), Winter 2013, at 5.

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would meet any checklist of individual institutional elements while being authoritarian in practice.

A third, and potentially more effective, possibility may be developing out of the current Hungarian mess. The European Union, as noted in Part I, has had a slow and partially ineffective response in Hungary. Actors must go through rigorous reviews of their institutional order to be admitted to the Union, but once admitted they are no longer subject to these sorts of "thick" reviews.[259] As a result, the Union has had to rig together a set of responses from tools, like infringement actions in front of the European Court of Justice, which were created for other ends. But Europeans are now considering creating an institution that would carry out "thick" periodic reviews of the constitutional order of all European states to ensure that they actually are functioning as liberal democracies.[260] Non-compliant states would be subject to adverse action by the Union. Theoretically, such an approach should prove superior to the other two at detecting abusive constitutionalism, because it allows space for exactly the kinds of complex analysis needed to identify and analyze it. Still, it is unclear whether a consensus exists to create such an institution within the European Union; the prospects in other regions are much grimmer in the short term.

The boldest of all the proposals is the recent call for an International Constitutional Court.[261] In the midst of the complex democratic advances and retrogressions of the Arab Spring, interim Tunisian President Moncef Marzouki argued that such a Court would be useful precisely as a protection against abusive constitutionalism. As he stated in his speech before the U.N. General Assembly, "dictatorships g[i]ve themselves a 'false legality' by organizing fraudulent elections and using democratic principles to undermine democracy itself."[262]

[259] The initial reviews are referred to as the Copenhagen Criteria. *See* ECONOMIC ACCESSION CRITERIA, http://ec.europa.eu/economy_finance/international/enlargement/criteria/index_en.htm.

[260] *See* Scheppele, *supra* note 258, at 8. Note that the Venice Commission does periodically offer opinions on various aspects of the legal and constitutional orders of the Eastern European states, and has issued numerous opinions on the new Hungarian constitutional order. *See supra* notes 75–78 and accompanying text. But the Commission's views have no legal effect, and it is part of the Council of Europe system (which includes the European Court of Human Rights), rather than the European Union.

[261] *See, e.g.*, Institute for Democracy and Electoral Assistance, *International Constitutional Court Proposed to Protect Democracy* (May 4, 2013), http://www.idea.int/wana/international-constitutional-court-proposed-to-protect-democracy.cfm (introducing and evaluating the idea).

[262] U.N. GAOR, 67th Sess., 12th, 13th, & 14th mtgs. (Sept. 27, 2012), *available at*

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The Court would be empowered to combat these abuses by, for example, "denounce[ing] certain constitutions or illegal charters or illegal or fraudulent elections."[263]

This proposal is provocative and potentially important in starting a productive dialogue at the international level. The analysis carried out in this Article suggests important questions. What body of law would such a court apply? On the one hand, there appears to be no developed body of international law on the topic, and the emergence of a thick enough consensus on the content of democratic institutions is still a long way off, even within most regions. On the other hand, if the court would be charged primarily with applying the domestic law of the state at issue, then it would raise the same problems faced by democracy clauses. Acts of abusive constitutionalism do not flagrantly violate the constitutional text, and international bodies have suspect legitimacy to undertake final interpretations of ambiguous points from a domestic constitutional order.[264] So it is likely that such a court would only be able to weed out flagrant violations of the constitutional order — badly rigged elections, for example — and not to deal with the subtler exercises of abusive constitutionalism surveyed in this Article.

Further, a commission or similar body may be the appropriate institutional form, rather than a court. The pressing task is not to determine whether a particular action was legal or illegal within the domestic constitutional order, or even whether a particular kind of institution — such as a constitutional court or impartial electoral commission — is present or missing from that order. It is instead to determine whether the order as a whole complies with certain basic principles that make it adequately democratic, and whether a given episode of political or constitutional change has made the regime markedly less democratic than it was previously. This is a task that might conceivably be undertaken by a global equivalent of the Venice Commission wielding a set of soft norms, but it is difficult to see how it could be carried out by an International Constitutional Court.[265]

http://www.un.org/News/Press/docs/2012/ga11295.doc.htm.

[263] *Id.*

[264] *See* Dixon & Jackson, *supra* note 231, at 174 (noting a number of potential "downside risks" to the practice of "extraterritorial constitutional interpretation").

[265] *See supra* text accompanying notes 257–259 (discussing the possible creation of an institution in Europe to carry out periodic reviews of the democratic orders of European states, in the wake of the problems in Hungary).

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## CONCLUSION: AN IMPOSSIBLE AGENDA FOR CONSTITUTIONAL THEORY?

My main purpose in this Article has been conceptual and descriptive. I have argued that the undermining of democracy through the use of the tools of constitutional change is likely to be increasingly common in the future, and that we have few adequate responses in comparative and international law.

The next question is obvious: can we develop more effective responses at either the domestic or international level? An honest answer must express some recognition of the difficulty of the task. As the examples here have shown, abusive constitutional practices can proceed through a variety of different routes to achieve the same goals — constitutional replacement can be used if constitutional amendment attempts are stymied, and would-be authoritarians can resort to undermining a number of different institutions, in a number of different ways, to achieve their goals. The Hungarian example is perhaps the best example of this fungibility problem: the Fidesz amended and then replaced the Constitution, and it has used a number of different techniques, both constitutional and legal, to undermine the power of checking institutions and to entrench the party's power.[266] For example, the Fidesz has undermined the judiciary by changing the jurisdiction of the Constitutional Court, by expanding the size of the court and then packing it, by altering the retirement age for ordinary judges, and by controlling the institution with power over ordinary judicial appointments.[267] Finding effective responses to this kind of structural undermining is a complex undertaking.

Still, the importance of the practice of abusive constitutionalism may help to reorient some of the key questions in the field. For example, recent scholarship has focused largely on multiethnic polities, which are seen as more likely to face a variety of ills, including violence and democratic overthrow.[268] But the problem of abusive constitutionalism seems more likely to crop up in relatively homogenous polities, where vote counts tend to be more unstable and political parties often less rooted.[269] The problem of abusive

[266] *See supra* text accompanying notes 71–74.

[267] *See supra* text accompanying notes 75–77.

[268] For an important recent contribution, see generally CONSTITUTIONAL DESIGN IN DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? (Sujit Choudry ed., 2008) (containing a number of essays with different models for accommodating difference within constitutional orders).

[269] In contrast, voting in multiethnic countries is often very stable, because political interests break down relatively rigidly along ethnic lines. *See* HOROWITZ, *supra*

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constitutionalism thus suggests a broad agenda on the design of institutions and elections for scholars working on relatively homogenous states.

Further, the problem of abusive constitutionalism reinforces a key point: the formal rules embodied in constitutions are often stunningly weak, and even perceivably strong rules can be captured in a surprisingly high number of circumstances. The trick, of course, is preserving constitutionalism in the face of this reality. In part, the answers lie in constructing a more intricate formal system of constitutional change: this is what amendment tiers or replacement clauses do. But perhaps more significantly, the answer lies in developing a different conception of constitutionalism altogether. The doctrine of unconstitutional-constitutional amendments, and perhaps the emerging European responses to Hungary, suggest a more substantive conception of constitutionalism — one that states that a constitution is not really constitutional unless it actually works in certain ways and adheres to certain fundamental principles. The emerging shape of these doctrines, and the distribution of authority between domestic and international interpreters, will be a major focus of the "global dialogue" of constitutional judges and scholars in coming years.

note 172, at 196 (noting that political results in multiethnic societies can resemble a "census").

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